DATE	NO.	PROCEEDINGS
Original filed 4/12/04	554-556	Response to Petitioner's Motion to Keep the Record Open (*Copy-original is missing from file*)
5/4/04	557-567	Final Order with Opinion Letter * * * Judge R. Terrence Ney
5/21/04	568	Notice of Appeal (Petitioner)
7/15/04	569-570	Notice of Filing of Transcripts
7/15/04	Separate	Transcript taken 12/5/02 before Judge R. Terrence Ney
7/15/04	Separate	Transcript taken 4/7/04 before Judge R. Terrence Ney
	In file	Exhibits

IN THE
SUPREME COURT OF VIRGINIA

Case No. 001110

MARIO A. BUSTILLO,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR APPEAL

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
05/15/00	Petition for Appeal Received
06/05/00	Brief in Opposition Received
06/07/00	Record Received
12/13/00	Panel Date
01/17/01	Disposition Date Disposition: REFUSED

IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 2422-98-4

MARIO A. BUSTILLO,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/13/98	1	Amended notice of appeal
10/23/98	3	Faxed notice of appeal from trial court
11/5/98		Record from trial court
		Manuscript (1 vol.) Transcript (7 vols.) Exhibits (1 vol.)
		Presentence report in record (sealed)
	12	Notice acknowledging receipt of record, dated November 5, 1998
11/10/98	13	Motion for enlargement of time
	15	Order entered on December 2, 1998
1/4/99		Petition for appeal (1 vol.)
1/5/99		Replacement petition for appeal (1 vol.)

DATE	NO.	PROCEEDINGS
1/28/99	16	Brief in opposition
3/8/99	39	Appellant's motion to remand
3/17/99	48	Objection to appellant's motion to remand
3/18/99	51	Appellant's motion to remand
3/24/99	54	Reply to objection to appellant's motion to remand
	70	Order entered on June 1, 1999
6/17/99	85	Letter from appellant's counsel to Clerk's Office, dated June 15, 1999
	88	Order entered on September 29, 1999
10/18/99	90	Appellant's designation and question to be presented
10/27/99		Additional document from trial court (1 vol.)
11/8/99		Opening brief of appellant (1 vol.)
11/8/99		Appendix (1 vol.)
12/2/99	93	Motion to extend time for filing Commonwealth's brief
	96	Order entered on December 3, 1999
12/13/99		Brief for the Commonwealth (1 vol.)

DATE	NO.	PROCEEDINGS
12/27/99		Reply brief of appellant (1 vol.)
	97	Opinion rendered on April 11, 2000
	104	Order entered on April 11, 2000
4/25/00	105	Notice of appeal to the Supreme Court

IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 2321-98-4

MARIO A. BUSTILLO,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/9/98	1	Notice of appeal
	3	Letter from Clerk's Office to appellant's counsel, dated October 9, 1998
10/23/98	4	Faxed sentencing order entered on July 24, 1998
11/5/98		Record from trial court (Shares with 2422-98-2) Manuscript (1 vol.) Transcript (7 vols.) Exhibits (1 vol.) Presentence report in record (sealed)
	13	Notice acknowledging receipt of record, dated November 5, 1998
11/19/98	14	Motion for enlargement of time
	18	Order entered on December 2, 1998

DATE	NO.	PROCEEDINGS
12/7/98	19	Letter from appellant's counsel to Clerk's Office, dated December 3, 1998
1/4/99		Petition for appeal (1 vol.)
1/4/99		Replacement petition for appeal (1 vol.)
1/5/99	20	Addendum to petition for appeal
1/28/99	21	Brief in opposition
	44	Order entered on June 1, 1999
6/17/99	52	Letter from appellant's counsel to Clerk's Office, dated June 15, 1999
	55	Order entered on September 29, 1999
10/13/99	57	Letter from appellee's counsel to appellant's counsel, dated October 13, 1999
10/18/99	58	Appellant's designation and question to be presented
10/27/99		Additional document from trial court (1 vol.)
11/8/99		Opening brief of appellant (1 vol.)
11/8/99		Appendix (1 vol.)
12/2/99	61	Motion for enlargement of time
	64	Order entered on December 3, 1999
12/13/99		Brief for the Commonwealth (1 vol.)
12/27/99		Reply brief of appellant (1 vol.)
12/27/99	65	Letter from appellee's counsel to appellant's counsel, dated December 27, 1999

DATE	NO.	PROCEEDINGS
2/7/00	67	Letter from appellant's counsel to Clerk's office, dated February 2, 2000
	68	Opinion rendered on April 11, 2000
	75	Order entered on April 11, 2000
4/11/00	76	Letter from appellant's counsel to Clerk's Office, dated April 7, 2000
4/17/00	77	Notice of appeal to the Supreme Court
4/17/00	78	Notice of appeal to the Supreme Court

IN THE
CIRCUIT COURT OF FAIRFAX COUNTY

Case No. CR-93337
Rule 5:3 and 5A:19

MARIO A. BUSTILLO

v.

VIRGINIA DEPT. OF CORRECTIONS, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/17/97	1	Warrant of Arrest
12/17/97	2	Commitment Order
	3	Information on Attorney
12/18/97	4-7	Notice of Hearing and Motion with Attachments
12/18/97	8	Notice to the Jail
	9	Motion/Bond Reduction
12/19/97	10	Order * * * Judge Dennis J. Smith[1]
12/29/97	11	Notice to the Jail
12/31/97	12	Certification Request
1/7/98	13	Request for Continuance

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[1] All asterisks in the Relevant Docket Entries appear in the original docket sheets.

DATE	NO.	PROCEEDINGS
1/20/98	14	Indictment for Murder
3/6/98	15	Order * * * Judge Bach
3/9/98	16-84	Letter to Mr. Bernhard from Todd Sanders with Attachments
3/9/98	85-86	Notice of Intention to Present Evidence of Alibi
3/9/98	87-88	Discovery and Inspection Order * * * Judge Bach
3/17/98	89-91	Jury List * * * SEALED By Order of Judge Lee
3/18/98	92	Commonwealth's Motion in Limine
3/19/98		Commonwealth's Jury Instructions
3/19/98	93-94	No. 2 Given
3/19/98	95	No. 3 Given
3/19/98	96	No. 4 Given
3/19/98	97	No. 5 Given
3/19/98	98	No. 6 Given
3/19/98	99	No. 7 Refused
3/19/98	100	No. 8 Given
3/19/98		Defendant's Jury Instructions
3/19/98	101-109	No. A-I Given
3/19/98	110	No. J Denied
3/19/98	111-112	No. K Denied
3/19/98	113	No. L Denied

3/19/98	114	No. M Given
3/19/98	115	Jury Question
	116-117	Jury Verdict Forms
	118	Jury Verdict
	119	Jury Verdict
4/6/98	120-121	Jury Trial Order (Day 1) * * * Judge Lee
4/7/98	122-123	Jury Trial Order (Day 2) * * * Judge Lee
4/7/98	124-125	Jury Trial Order (Day 3) * * * Judge Lee
4/7/98	126-127	Jury Trial Order (Day 4) * * * Judge Lee
4/9/98	128	Letter Dated March 16, 1998 to Mr. Bernhard from Todd Sanders
4/9/98	129	Letter to Mr. Bernhard from Todd Sanders
5/7/98	130	Order of Substitution * * * Judge Lee
6/9/98	131-147	Presentence Investigation Report
6/12/98	148	Praecipe/Notice
6/12/98	149	Notice of Motion
6/12/98	150-161	Defendant's Motion to Set Aside Verdict
6/15/98	162-168	Addendum to Defendant's Motion to Set Aside Verdict with Attachments
6/16/98	169	Order of Substitution * * * Judge Lee
6/29/98	170	Order * * * Judge Lee

6/29/98	171	Order * * * Judge Lee
7/13/98	172-191	Commonwealth's Exhibits in Opposition to Defendant's Motion to Set Aside Verdict
7/13/98	192-197	Commonwealth's Memorandum in Opposition to Set Aside the Verdict
7/17/98	198-201	Sentencing Guidelines
7/17/98	202	Order for Withdrawal of Blood * * * GBL
7/24/98	203-204	Sentencing Order * * * Judge Lee
7/28/98	205	Letter to Judge Lee from Todd Sanders
8/3/98	206-207	Order * * * Judge Lee
8/7/98	208	Praecipe/Notice
8/7/98	209-214	Defendant's Renewed Motion to Set Aside Verdict
8/14/98	215	Order * * * Judge Thacher
8/14/98	216	Defendant's Motion to Suspend Execution
9/4/98	217-219	Commonwealth's Affidavits in Response to Defendant's Second Motion to Set Aside Verdict
9/11/98	220-223	Defendant's Reply to Commonwealth's Submission with Attachments
9/14/98	224-226	Commonwealth's Supplemental Affidavit in Response to Defendant's Second Motion to Set Aside Verdict with Attachments
9/15/98	227-230	Addendum to Defendant's Reply to Commonwealth's Submission with Attachments

10/1/98	231	Addendum to Defendant's Reply to Commonwealth's Submission
10/2/98	232-233	Addendum to Defendant's Reply to Commonwealth's Submission
10/7/98	234-239	Opinion Letter * * * Judge Lee
10/7/98	240-242	Notice of Appeal with Receipt Attached
10/8/98	243	Letter to Clerk from Counsel Kiyonga
10/8/98	244	Final Order * * * Judge Lee
10/8/98	245-246	Amended Notice of Appeal

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Criminal No. 93337

COMMONWEALTH OF VIRGINIA

v.

MARIO BUSTILLO,
Defendant.

March 19, 1998

Appearances:

On Behalf of the Commonwealth:

TODD SANDERS, ESQUIRE

Asst. Commonwealth's Attorney

On Behalf of the Defendant:

DAVID BERNHARD, ESQUIRE

* * * * *

[11] * * * Mr. Sanders: Thank you, Your Honor. Members of the Jury, I would like to briefly thank you for your time and attention in this case.

* * * * *

[20] This whole Sirena thing, I don't want to dwell on it too much. It's very convenient that Mr. Sirena apparently isn't available. There was a witness called; a Ms. Ulma. She's on a plane going to Honduras seven days later and she sees Sirena on the plane. Of course, the inference he wants you to believe is that he's fleeing from this offense. Well, even if he was on that plane, that's seven days later.

Someone else has already been arrested and identified by everybody. That's if he was on the plane. She still doesn't know his full name. Amaya doesn't know the full name. The plane tickets you have are for that witness, not for this Sirena. I submit [21] that's just a red herring. It's very convenient to have that at this point, in March of 1998, to be able to say that.

* * * * *

[75] * * * There was testimony from the person that was supposedly on this plane about this Sirena. I don't want to comment too much on that, but I'm not really clear. How did she end up sitting there testifying? How did Mr. Amaya? Counsel will tell you, well, if he was in this gang, suggests that they'd be here. If Sirena really did this—this so called Sirena—who's now in Honduras, and there's no doubt that this Defendant was in that gang, they'd all be here telling you that. He called one person who, I submit, was not credible. That one person said that he's not even in the gang.

* * * * *

Commonwealth of Virginia

COUNTY OF FAIRFAX

4110 CHAIN BRIDGE ROAD, ROOM 123
FAIRFAX, VIRGINIA 22030-4047

[date stamp]

ROBERT F. HORAN, JR.
COMMONWEALTH'S ATTORNEY
RAYMOND F. MORROGH
DEPUTY COMMONWEALTH'S ATTORNEY
703-246-2776

RAYMOND L. BROWNELLE
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JULIUS ROTHSTEIN
TONI L. STEVENS
LORI B. DIGIOSIA
IAN M. RODWAY
WILLIAM T. ROOTS, JR.
WILLIAM E. FITZPATRICK
JOHN F. CARROLL
DOUGLAS R. KAY
LAURA F. HERING
ASSISTANTS

March 9, 1998

HAND-DELIVERED

David Bernhard, Esq.
Bernhard & Gardner
6105-D Arlington Blvd.
Falls Church, Va. 22044

Re: Commonwealth v. Mario Bustillo
Criminal No. 93337

Dear Mr. Bernhard:

Enclosed please find the following documents (67 total pages):

1. Report of autopsy
2. Medical records
3. Copy of photo array
4. Copies of crime scene photos, defendant and victim
5. Copy of Miranda form
6. Defendant's NCIC record

Ex. 1

Originals of the pictures may be examined at your convenience. Additional pictures and diagrams may be obtained prior to trial and will be provided if and when they become available. Two baseball bats were recovered at the scene and are available for your inspection at your convenience. No latent fingerprints or blood were found on the bats. The defendant's clothes were also collected and are available for inspection.

The substance of the defendant's statement to law enforcement consists of the following: On December 11, 1997 the defendant was interviewed by Detective Bob Murphy. Detective Allen was present during this interview. The defendant provided his [biographical] information and stated that he is originally from Honduras. He had been in the United States for three years and has a green card through I.N.S. He is a senior at Lee High School and speaks English well. He lives with his mother, Belinda Davila, and his brother, Edwin Bustillo, who is seventeen, at 6117 Backlick Road. He has a sister, Damaris Bonilla, who is in her twenties, and lives in an apartment somewhere on Cumberland Avenue. He stated that he cannot remember his sister's address or phone number. He drives a 1986 Pontiac Sunbird 2-door, gray and black in color. He left his car parked near Lee High School. His sister drives a red Honda Civic.

He was read his Miranda rights. He stated he understood his rights and read them back out loud in English. He signed the rights form and said he would speak to them about the case. He was told he had been positively identified by witnesses at the scene. He said he was not there and knows nothing about the case. He said he was home when it happened. He said he does not know the victim James Merry and that he was not at Popeye's restaurant last night. He said the day before he was in detention from 2:20 p.m. to 3:30 p.m. at school for being tardy. He said he left school at 3:30 p.m. in his car and arrived at 3:40 p.m. At

approximately 4:00 p.m. his mother arrived home and they had dinner with his brother. He said at 6:00 p.m. he drove to his sister's apartment on Cumberland Avenue and picked her up and took her to Shopper's Food Warehouse in Franconia somewhere near Springfield Mall or Beulah Street. He said he and his sister grocery shopped and then returned to her apartment at 7:00 p.m. He said he could not recall his sister's address or phone number. He admitted he goes and calls there frequently. He said his sister used his car to go back out to Blockbuster where she rented two movies. He said his sister returned to her apartment at 7:20 p.m. and she and the defendant watched movies. He began to get agitated and irritated at the questions and it was explained they were simply looking for the truth. He could not provide an answer when asked what movie he watched with his sister. He was asked if he was affiliated with a gang and he quickly replied no. He said he has heard of C.S.L. or Commerce Street Locos, but he is not a member. He said he does occasionally hang out with members. He said he was not going to answer any more questions until he could talk with an attorney and the interview was terminated.

At the preliminary hearing Esmirna Christina Hondoy stated after sitting in the back of the courtroom that she didn't think it looked like him.

Johnny Bustamonte told law enforcement that he wasn't there but had heard from unnamed sources that a guy who goes by the name of Sirena had committed the offense. Jose Armando Amaya told law enforcement that he saw the defendant and Sirena at the scene and both had bats. They approached the victim with Sirena behind the defendant. His view was obstructed by a brick pillar and he couldn't tell which one struck the victim. Renyery Alexis Espinoza, Godofredo Jimenez, and Nicolas Parada have also admitted that Sirena was at the scene. Sirena's first name appears to be Julio.

Criminal records of any of the Commonwealth's witnesses involving felony and moral turpitude convictions will be provided when the witness testifies.

Please contact me if you have any questions regarding the above or any other aspect of this case.

Very truly yours,

/s/

Todd F. Sanders

Commonwealth of Virginia

COUNTY OF FAIRFAX

4110 CHAIN BRIDGE ROAD, ROOM 123
FAIRFAX, VIRGINIA 22030-4047

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WILLIAM E. FITZPATRICK
JOHN F. CARROLL
DOUGLAS R. KAY
LAURA F. HERING
ASSISTANTS

March 16, 1998

HAND-DELIVERED

David Bernhard
6105D Arlington Blvd.
Falls Church, Va. 22044

Re: Commonwealth v. Mario Bustillo
Criminal No. 93337

Dear Mr. Bernhard:

Officer Bayliss spoke with some of the witnesses at the scene. His report reflects a description of the assailant as "Mario", w/m, 5' 9", 180 lbs., 17-18 years old, black hair, brown eyes, wavy hair, medium length, wearing a red "nautica sweater", black pants and a black skull cap. The report reflects an aluminum bat was used. Officer Bayliss will be available for trial.

Officer Milam's report reflects a description of the assailant as "Mario", h/m, 18 years old wearing a red shirt and black pants. Officer Milam will be available for trial.

Very truly yours,

/s/
Todd F. Sanders
Assistant Commonwealth's Attorney

tfs

[seal omitted]

CONSULADO DE HONDURAS

1612 K Street, N.W. • Suite 310
Washington, D.C. 20006
(202) 223-0185 • FAX (202) 223-0202

DECLARACION JURADA

Yo, Yolanda Membreño-Castellanos, Primer Secretario Encargada de los Asuntos Consulares de la Embajada de Honduras en Washington, Distrito de Columbia, declaro lo siguiente:

Según consta en los archivos de esta Sección Consular, estas oficinas no fueron informadas por ninguna autoridad del Estado de Virginia ni por cualquier otra persona de la situación en que se encontraba el sr. Bustillo—ciudadano hondureño—antes de terminar su juicio que se llevó a cabo en el mes de marzo de 1998.

En el caso de haber tenido conocimiento—antes de su juicio—de que Mario Bustillo tenía pendiente un juicio por el delito de *Asesinato* en una Corte del Estado de Virginia, el Consulado podría haberle prestado asistencia en su defensa criminal según lo estipulado en la Convención de Viena sobre Relaciones Consulares de 1963.

En el evento de haber sido informada que la teoría de la defensa era que el verdadero culpable era otro joven de nombre "*Julio*" y que ese joven llegó a Tegucigalpa, Honduras el 17 de diciembre de 1997 en el vuelo 769 de Continental Airlines procedente de Houston, Texas, esta Sección Consular pudo haber solicitado a las autoridades pertinentes se investigara con las autoridades de immigración si en tal vuelo viajaba alguna persona bajo ese nombre, su nombre completo y dirección y haber intentado tener un contacto con tal persona para entrevistarlo y determinar una decisión posterior con el fin de asistir de una mejor manera al sr. Bustillo.

[seal omitted]

/s/
Yolanda Membreño-Castellanos
Consul

[notary acknowledgement]

TRANSLATION COVER

Source materials: Statement by from Honduran Consul Yolanda Mem[b]reño-Castellanos, dated March 2, 1998.

Source Language: Spanish

Object Language: English

Translator's Declaration

I, Michael Zogby, hereby certify that I am duly certified by the United States Courts as an interpreter and translator of the Spanish language, and that the attached document is a true and accurate translation of the above-mentioned source materials.

/s/ Michael Zogby — 3/3/99

Michael Zogby — date

Certified Interpreter/Translator

Translator's Note:

Text in Italics has not been translated from the source language. It is rendered as it appears in the original text.

TRANSLATION

[seal]

HONDURAN CONSULATE
1612 K Street N.W. Suite 310
Washington, D.C. 20006
(202) 223-0186 FAX (202) 223-0202

AFFIDAVIT

I, Yolanda Membreño-Castellanos, First Secretary in charge of Consular matters at the Honduran Consulate in Washington, D.C., hereby state the following:

According to this Consulate Section's files, this office was not informed by any authority of the State of Virginia or anyone else of the situation confronted by Mr. Bustillo, a Honduran citizen, before the end of his trial, which took place in March of 1998.

Had we known, before his trial, that Mario Bustillo was facing murder charges in a Virginia state court, the Consulate could have aided him in his criminal defense pursuant to the provisions of the 1963 Vienna Convention on Consular Relations.

Had we been informed that the defense's theory was that the culprit was another young man by the name of "Julio," and that that young man arrived in Tegucigalpa, Honduras, on December 17, 1997, on Continental Airlines' flight 769 from Houston, Texas, this Consular Section could have asked the apropriate authorities to inquire of the immigration authorities whether a person by that name had flown in that flight, that person's full name and address, and could have attempted to contact that person to interview him and afterwards make a decision to render the best possible assistance to Mr. Bustillo.

[seal] /s/
Yolanda Membreño-Castellanos
Consul

[notary acknowledgement]

TRANSLATION COVER

Source materials: Videotape designated "Conversación entre Reniery Alexis Espinoza Maradiaga y Julio César Osorto," which translated means "Conversation between Reniery Alexis Espinoza Maradiaga and Julio César Osorto," and bearing a notarial seal and a signature.

Source Language: Spanish

Object Language: English

Translator's Declaration

I, Raúl F. Ortiz, hereby certify that I am duly certified by the United States Courts as an interpreter and translator of the Spanish language, and that the attached document is a true and accurate translation of the above-mentioned source materials.

/s/ Raúl F. Ortiz — 27 Feb 99

Raúl F. Ortiz — date

Certified Interpreter/Translator

Translator's notes:

1. Text in Italics has not been translated. It is rendered as it appears in the original text.
2. Text enclosed in brackets [] does not appear in the original text. It has been inserted by the translator to enhance comprehension.
3. The left column represents the transcription of the source text. The right column represents the translation into the object language.

4. Footnotes are not part of the source text. They are the translator's comments.

Legend:

[ui]: Unintelligible. In some cases it may only be noise that cannot be distinguished from speech.

[ir]: Interruption in recording

A: Reniery Espinoza

B: Juiio César Osorto

A: ¿Qué chele, vos?

B: Con aquel chele que se metió a pedo por aquellas chavalas.

A: ¿Por la Eva?

B: Ajá.

A: ¿Aquél de allá del gringo, hombre?

B: El pinche gringo, *man*, *that shit*, basura, *man*. Qué clavo ese que me metí, loco. Sabes que el bato se la gana por majes. Es que una vez él me quiso poner en el *High*, me quiso poner también, me quiso poner el dedo. Al Primo le pegó un golpe aquí en la cabeza. Esa vez llegó él con unos batos de la Mara Li, aquella mara de Chirilagua, basura, *man*, y esa vez allí en el Popeye, llegamos nosotros al Popeye y los cabrones empiezan a tirar barrios, y llegamos nosotros locos y entonces nosotros salimos y él también salió y nos estaba

A: What blond guy, man?[1]

B: With that blond guy that got into a fight over those chicks.

A: Over Eva?

B: Uh-huh.

A: You mean that guy with the gringo?

B: That fucking gringo, *man*, *that shit*, damn, *man*. I really did it that time. You know that guy is the biggest idiot. Like, once at the *High* he tried to, he also tried to, he tried to finger me. He hit *Primo*[2] right here on the head. That time he arrived with some homeboys from the Mara[3] Li [gang], that gang from Chirilagua. Damn, *man*, and that time at Popeye's, we got to Popeye's and those bastards started to throw signs, and we homeboys arrived, and then we came out, and he came out too, and he was throwing signs at us.

---

[1] "Blond guy" is translated from the word "chele," which may mean a blond person or simply someone with fair skin and Caucasoid features.

[2] "Primo" means cousin, but it can also be a nickname.

[3] "Mara" means "gang."

tirando barrio.

A: [ui] Yo no, yo voy a ver que ondas aquí.

A: [ui] Not me, I'm going to see what's up.

B: Aquí se puede vivir también.

B: You can get by here.

A: [ui] Yo creo que aquí me voy a quedar trabajando mejor. [ui]

A: [ui] I think I'm going to keep working instead. [ui]

B: Fijate, te voy a decir una cosa. Yo estuve allá cuatro años y no hice nada, y otros majes que se han venido aquí [ui] y he visto a otros majes con pijas de carros y negocios de ellos mismos. Y yo que vine de la U.S.A. palmado, *man*.

B: Look, I'll tell you something. I was there for four years and didn't do a thing, and other guys have come over [ui] and I've seen other guys with fucking cars and their own businesses. And me, having come from the U.S.A. and all, and I'm broke, *man*.

A: Pero es que vos eras pandillero hijo de puta, y sólo te la llevabas jodiendo.

A: But that's because you were a fucking gangsta just messing around.

B: No digas nada que allí andábamos los duques. Andábamos cagando el palo.

B: Hey, man, we both were. We were messing around all over.

A: La cagamos, pero está cabrón.

A: We were messing around, but it's rough.

B: Está cabrón la cosa. Yo para que te voy a decir, yo no ambiciono ir a los Estados Unidos. Vieras cuanto majes ahí que se quieren ir para allá, para allá en los Estado Unidos. Y yo les digo que allá no

B: Sure is rough. I'll tell you, I don't care for going to the United States. You should see how many guys around want to go over there, to the United States there. And I tell them that place is not for

es para cualquiera.

A: Sin paja. ¿Y qué ondas aquí con las viejas? ¿Tienes hijos o qué onda?

B: Tengo dos, *man*. Tengo dos chavas, *man*.

A: [ui] Las otras veces me di cuenta que te habías ido para El Salvador. ¿Qué onda?

B: Sí, anduve allá.

A: ¿Nicaragua?

B: Sí. Es como te digo. [ui] En ese tiempo trabajaba en un camión. Pero al viejo se le fundió el camión. Y sí, yo anduve por todo eso: El Salvador, Nicaragua, Costa Rica, jalando frijol para Honduras.

A: [ui] O sea que te volviste mil usos [ui]

B: ¿Y qué voy a hacer, viejo? Hay que buscar la vida.

A: [ui] Como vos andabas un suéter rojo, puta qué cagada, y andabas un gorro vos. ¿Verdad loco?

B: Es que, puta, loco, fijate que las chavalas, yo sabía que esas chavalas me iban a que-

just anybody.

A: No shit. What about women here? You have children, or what?

B: I have two, *man*. I have two kids, *man*.

A: [ui] I heard some times before you had gone to El Salvador. What was that?

B: Yeah, I was there.

A: Nicaragua?

B: It's like I say. [ui] At that time I was working with a truck. But old man blew the engine on the truck. Yeah, I drove around all over there: El Salvador, Nicaragua, Costa Rica, hauling beans to Honduras.

A: [ui] So you did everything [ui]

B: What do you want, man? You gotta make a living.

A: [ui] Like, you were wearing a red sweater, fuck, what shit, and you were wearing a cap. Right, homeboy?

B: It's just that, fuck, homes,[1] see, the chicks, I knew those chicks were going to burn me,

[1] "Homes" is used as variation of "homeboy."

mar, hom. Yo por eso no me dejaba ver de esas putas, *man*. *Shit*, dije yo, me voy para Honduras, dije yo.

man. That's why I wouldn't let those bitches see me, *man*. *Shit*, I said, I'm going to Honduras, I said.

A: Pero esas estaban adentro, [ui] la Valeria y la Claudia.

A: But they were inside, [ui] Valeria and Claudia.

B: Sí, esas parece estaban adentro. Es que el hijo de puta salió él solo.

B: Yea, seems like they were inside. It's just that the son of a bitch came out alone.

A: A fumar un cigarro.

A: To smoke a cigarette.

B: A fumar un cigarro y a tirar barrio. Mala onda, viejo. Y allí en la zona de nosotros. A tirar barrio el hijo de puta.

B: To smoke a cigarette and throw signs. Bad news, man. And there, in our hood. Throwing signs that son of a bitch.

A: O sea que lo hallaste con el cigarro en la boca.

A: So you found him with the cigarette in his mouth.

B: Se lo metí ese cigarro de un solo bombazo. Que se lo tragara, loco. ¡Cómo sonó ese bombazo!

B: I shoved it down with one whack. So he would swallow it, homes. Man, that was loud!

A: Pero ¿vos pensaste, o no le hacías el chilazo?

A: But did you think, or you didn't think the blow...

B: No, yo, yo...

B: No, I, I...

A: Voz lo querías calentar, pero se te pasó la mano.

A: You wanted to [b]eat him up, but you overdid it.

B: Se me pasó la mano. Es que calentó el maje.

B: I overdid it. It's just that that fool made me mad.

[ir]

[ir]

B: Esas muchachas estaban adentro.

B: Those girls were inside.

A: Verdad que estaban adentro.

B: Ellas estaban adentro. Él salió afuera, no más él solo [ui].

A: Y vos, ¿para dónde agarraste cuando le diste el vergazo?

B: ¿Ja?

A: ¿Vos para dónde agarraste?

B: ¡Já! ¿Y me iba a quedar allí, pues? Me fui por el lado del *Giant* . . .

A: El *Giant*.

B: . . . al lado del *Giant* por *McDonald's*. . .

A: Sí.

B: . . . por donde están los *CD's*.

A: Sí.

B: Pues yo miré cuando llegó la jura. Pero, ¿cómo me iba a quedar allí yo? ¿Acaso que soy maje? Tras que llegué a la esquina donde venden los *CD's*, tras que llegué a la esquina. . .

A: Por allí por los teléfonos estaba yo.

B: . . .me contuve y me fui

A: That's right, they were inside.

B: They were inside. He came out, just by himself [ui].

A: And where did you go after you smacked him?

B: Huh?

A: Where did you go?

B: Ha! You think I was going to stay there? I went over towards the *Giant*, . . .

A: The *Giant*.

B: . . . next to the *Giant* by McDonald's, . . .

A: Yeah.

B: . . . over where the *CD's* are.

A: Yeah.

B: See, I saw when the cops arrived. So how could I stay there? You think I'm stupid? After I got to the corner where they sell the *CD's*, after I got to the corner. . .

A: I was around there by the phones.

B: . . .I got a hold of myself

despacito. Los policías andaban así. Esa vez estuvo calentito allí. No ves que medio mundo andaba corriendo, uno por allá, otro por acá.

and started off slowly. The police were all over. It was hot that time. Everybody and his brother was running, one over here, another over there.

A: Pero ¿vos no pensaste que te lo habías echado, o sentiste que le diste duro?

A: But did you think you had thrashed him, or did you feel like you had hit him hard?

B: Mira, *man*. Yo cuando le pegué ese animalazo, no, yo, yo le escuché como un cajón que le sonó a ese hijo de puta. Pero no sé, como se lo llevaron al hospital, ¿me entiendes?, y yo me vine también...

B: Look, *man*. When I smashed him with that blow... I... man, I heard that son of a bitch sound like a big box. But I don't know, since they took him to the hospital, you know?, and I left, too...

A: Y el bate, ¿qué le hiciste?

A: What about the bat? What did you do with it?

B: ¿Ja?

B: Huh?

A: ¿Te lo llevaste con vos? ¿Dónde está el bate?

A: Did you take it with you? Where's the bat?

B: Lo boté allá por la escuela.

B: I threw it away over by the school.

A: ¿Sí?

A: Yeah?

B: Aquella escuela que está allá atrás donde está el campo donde íbamos a jugar pelota. [ui] Allá lo tiré a la quebrada.

B: That school back over there by that field where we used to go play ball. [ui] I threw it the hell away.[5]

A: Sí.

A: Yeah.

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[5] This phrase can also mean "I threw it over into the ravine," or "I threw it over into the mountain stream."

B: Es que yo me fui a meter un rato allí, porque yo miraba muchos policías en la calle. Tuve miedo, pues. Y me estuve un buen rato allí. Me compré un seis de cerveza allí en el *CVS*.

B: You see, I went over there to stay for a while because I saw a lot of cops on the street. You know—I was afraid. So I stayed a good while there. I bought myself a six-pack of beer at *CVS*.

A: Y te fuiste a la pija.

A: And you got the hell out of there.

B: Y me fui a metérmelas allá.

B: And I went over there to drink them.

[ir]

[ir]

A: Que Mario era, loco. Lo confundieron con vos, loco, diciendo que andaba de sombrero, con el gorro, y vos andabas de gorro y de suéter.

A: That it was Mario, homes. They confused him with you, homes, saying he was wearing a hat, with the cap, and you were wearing a hat and a sweater.

B: Suéter rojo andaba yo, y un gorro negro.

B: I was wearing a red sweater and a black cap.

A: ¿Verdad? Vos te quitaste el gorro allí, ¿no?

A: Yeah, right? You took off the cap there, right?

B: Sí, hombre.

B: Yeah, man.

A: Tal vez te reconocieron.

A: Maybe they recognized you.

B: No, pues es que yo me lo quité cuando iba por la esquina.

B: No, because I took it off as I was rounding the corner.

A: ¿Sí?

A: Yeah?

B: Sí.

B: Yeah.

A: ¿Es que vos saliste corriendo [ui] para la

A: So you took off running [ui]

esquina?

B: Todo el mundo salió corriendo. ¿Cómo me iba a quedar yo allí?

A: ¿Y Jesse te siguió, vos?

B: ¿Ja?

A: ¿Te siguió Jesse?

B: Sí.

A: ¿Más o menos cuánto?

B: Mira, no me siguió mucho, *man*. Me siguió poco. Sólo me quedó viendo.

A: Ese puto tuvo la culpa de todo. Vos ya sabías, ¿verdad? Si a vos te quiso poner en el *High*.

B: Sí.

A: [ui] y al el Primo.

B: Sí.

A: Sí.

B: No hay nada.

[ir]

B: Pero mira ahora yo ya no me pongo más esas mierdas. Vos también así me dijiste.

A: Andas pegado.

B: Cuando me vine sí me los ponía. Andaba con los pantalones. Como un mes anduve así. Pero cien por ciento vi

towards the corner?

B: Everybody took off running. You think I was going to stick around?

A: And Jesse followed you?

B: Huh?

A: Jesse followed you?

B: Yeah.

A: About how far?

B: Well, he didn't follow me far, *man*. Just a little. He just kept looking at me.

A: It was all that bastard's fault. You knew that already, right? He wanted to finger you at the *High*.

B: Yeah.

A: [ui] and Primo.

B: Yeah.

A: Yeah.

B: It's empty.

[ir]

B: But look, I don't wear that shit any more. You told me that, too.

A: You wear tight stuff.

B: When I had just come I would wear them. I'd wear the pants. I went around like that for about a month. But I

que no me convenía [ui] y los vendí. Los fui vendiendo casi todos. Sólo uno tengo allí, que de vez en cuando me lo pongo en mis loqueras. Y es que me animo que como que estoy allá y me los pongo.

just saw it wasn't a good idea [ui] and I sold them. I sold them all off. I just have one left. I put it on every now and then when I get crazy. I just get a feeling I'm back over there and I put them on.

A: Aquí te matan si andas así.

A: They'll kill you here if you dress like that.

B: Me los pongo y me pongo los *Timberlands*, y me voy, como quien dice, estoy en la U.S.A. aquí. Ando ilusionado sólo, pues.

B: I put those on and I put on the *Timberlands*, and I take off, just like being in the U.S.A. here. Just day-dreaming, you know.

A: Aquí la policía te mata si andas así.

A: The police here will kill you if you go around like that.

B: ¿No miras que hasta los aritos también me quité, viejo?

B: Man, don't you see I even took off the earrings?

A: Puta, igual que a mí. Tres andaba, y no ando nada.

A: Fuck, just like me. I used to wear three, now I don't wear any.

B: A veces me animo a ponerme uno, [ui] ¿pero para qué, loco? Pero no. ¿Para qué, eh? La gente me dice que parezco culero.

B: Sometimes I get the urge and put one on, [ui] but what's the use, homes? No, man. What for, eh? People tell me I look like a fag.

A: Ja, ja. No le paran bolas las viejas a uno. Julio, Sirena, puto [ui]

A: Ha, ha. The girls won't pay attention. Julio, Sirena, bastard [ui]

B: ¡Esos batos como me pusieron!

B: Those homeboys really did it to me.

A: Como si venías de Alaska,

A: As if you were coming

¿verdad, Sirena?

B: Sí, venía del mar, viejo.

A: Venías del mar, chavalo. Da miedo. En camiseta caminabas vos.

B: En shorts y camisetas. ¿No te acordabas? [ui] Y [ui] ¿Y el chavo aquel del Máxima aquel? Se lo comieron, ¿verdad?

A: Ya lo vendió el padrastro.

B: ¿No tiene más [ui]

A: El Célica blanco.

B: [ui]

A: Sí.

B: No vuelve a comprar otro carro.

A: Ese hijo de puta es la pija.

B: No trabaja, ¿verdad loco? Lo mantienen las mujeres así.

A: Lo mantienen las mujeres y los suegros.

B: Oh, el viejo no lo quiere, ¿verdad? Esa gente la cagan, loco. ¿Qué más quieren?

A: Sí, hombre. Estudiaba. ¿Qué más quería?

from Alaska, right Sirena?

B: Yeah, I was coming from the sea, man.

A: You were coming from the sea, dude. Scary. You went around with a tank top.

B: Shorts and tank top. Remember? [ui] And [ui] What about that dude with the Maxima? Gone, right?

A: His stepfather sold it.

B: He doesn't have any more?

A: The white Celica.

B: [ui]

A: Yeah.

B: He won't buy another car.

A: That son of a bitch is big shit.

B: He doesn't work, right? Women support him.

A: Women and in-laws support him.

B: Oh, the old man doesn't like him, right? Those people are shit, homes. What do they want?

A: Yeah, man. He was going to school. What else did he want?

B: Yo salí así, sólo con el pantalón y una camisa, y otro pantalón y otra camisa. Así venía yo con dos mudadas no más y un maletín chiquito.

B: I came out like this, with just pants and a shirt, and another set of pants and a shirt. That's how I came, with just two changes of clothes and a little bag.

A: Así me dijo Janet. Con una mochila y una gorrita.

A: That's what Janet told me. With a backpack and a cap.

B: Sí, una gorrita Polo doblada así para atrás. Así venía yo. Así es la chapa. Eso es todo, una gorrita y un pantalón negro.

B: Yeah, a Polo cap turned back like this. That's how I came. That's the style. That's it, a cap and black pants.

A: Le trajiste la ropa a Cruz y a la Brosa. Así es el cuento allá.

A: You brought Cruz and la Brosa's clothes. That's what they say over there.

B: [ui] Una camisa fue y así habla tanta mierda. ¿No ves que él me robó una Polo a mí? Me la sacaron del maletín.

B: [ui] just a shirt and they're saying all that shit. You know he stole a Polo one from me? They took it out of the bag.

A: Sí.

A: Yeah.

B: Ese hijo de puta de la Brosa, mejor lo hubiera matado aquel día yo. A [ui] a ese hijo de puta allá en la galera. Allí me hubiera gustado trabarlo de vuelta para que no sea tan mierda.

B: That son of a bitch la Brosa, I should have killed him that day. [ui] that son of a bitch over there at the galley.[6] I would have liked to get him there again so he wouldn't be such a big shit.

A: ¿Te acordás en la Ruta Uno, aquella vez que te dieron verga en la cara?

A: Remember on Route One, that time when they whacked you in the face?

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[6] Galley can also be translated slaughterhouse.

B: Sí, ¿y no me dejó botado él, pues?

B: Yeah, and he just left me there, didn't he?

A: Y yo te levanté a vos.

A: And I picked you up.

B: Vos me le levantaste.

B: You picked me up.

A: Sí. ¿Y no te tenían con la pata en el pescuezo, y yo te levanté?

A: Yeah. They had you with one foot on your neck, didn't they? And I picked you up.

B: Ja.

B: Ha.

A: ¿Y no vivíamos en el mismo apartamento, loco? ¿Cómo que no?

A: And we lived in the same apartment, didn't we, homeboy? Right, man.

B: Yo ni cuenta me di. Fijate viejo, yo amanecí en la casa. Yo amanecí a [ui], pero no sé cómo amanecí.

B: I wasn't even aware of it. Look, man, I just woke up at home. I woke up [ui], but I don't even know how I made it.

A: Bien matado a pija.

A: You were totally thrashed.

B: Sí, 'ta bueno. Los Liros locos fueron esos, ¿verdad?

B: Yeah, man. It was those Liros homeboys, wasn't it?

A: ¡Los Liros putos!

A: Those fucking Liros!

B: ¡Los Liros putos fueron!

B: It was those fucking Liros!

A: Así es la vida del pandillero, bato.

A: That's the life of a gangsta, homes.

B: Así es, loco.

B: That's how it is, homes.

A: Hoy estás vivo, mañana podés estar muerto.

A: Alive today, tomorrow could be dead.

B: La Primera fue la que deshizo los Pershing y [ui] allí, ¿verdad?	B: It was First [Street][7] that wiped out Pershing and [ui] there, right?
A: La Primera loco, esos hijos de puta fueron.	A: First [Street], homes, those son of a bitches.
B: Deshicieron a los Pershing.	B: They wiped out Pershing.
A: La Primera y los Tigres fueron los que pijearon al hermano de Sergio.	A: First [Street] and the Tigers were the ones that kicked Sergio's brother's ass.
B: Los dos para él solo.	B: The two of them against him alone.
A: Lo hicieron pija, loco.	A: They kicked his ass, homes.
B: Y siempre bajan las jebas de allá. Tenías una jeba vos en la Ruta Uno, ¿verdad?	B: And those chicks still come down. You had a girl on Route One, right?
A: Sí, Ana.	A: Yeah, Ana.
B: ¿Cuál?	B: Who?
A: Ana la patas pandas. No sé cómo se llamaba. [ui] Jessica, loco.	A: Ana the bow-legged one. I don't know her name. [ui] Jessica, homes.
B: [ui]	B: [ui]
A: [ui] Oh, te vi en una foto. ¿Te acordás que una vez salimos de caballeros?	A: [ui] Oh, I saw you in a photograph. Remember we got all dressed up[8] once?
B: Sí.	B: Yeah.

[7] "La Primera" means "the First." Translator assumes by the context that it refers to First Street.

[8] "All dressed up," literally "came out as gentlemen," may also mean came out as ushers in a wedding.

A: ¿Saliste vos de caballero?

B: Sí, en el vergueo con el gordo allá.

A: Oh, sí. Saliste cuando le dieron pija a aquellos.

B: Ya.

A: Salimos de caballeros de corbatín y todo el pedo.

B: Tipo magnate.

A: Yo andaba bien a pija, y vos andabas medio tomado ¿verdad?

B: Yo andaba tomado. Yo antes de irme para allá, yo me metí dos puros. [ui] Cuando yo andaba allá andaba un poco noqueado, pero yo sabía lo que andaba haciendo. Y es que yo llegué con el Sergio allí. Y es que como yo no tenía cachos, ¿verdad? Zapatillas, ¿verdad?

A: Oh, sí, a Payless Shoes se fueron.

B: Venite, me dice Sergio, vamos para allá. Sólo vamos al mandado. Sólo llévate la caja, y le quitamos los sellos, [ui] y ya salimos. Sólo me fui a cambiar a la casa que ni me bañé. Con eso te cuento todo. Y me cambio, loco, y le digo a

A: You got all dressed up?

B: Yeah, during that fat guy's fight guy.

A: Oh, yeah. You came out that time when they kicked those guy's asses.

B: Yeah.

A: We got all dressed up with bow tie and all that shit.

B: Like big shots.

A: I was really smashed, and you were kind-of drunk, too.

B: I was drunk. I had two smokes before going over there. [ui] When I was there I was a little high, but I knew what I was doing. And, like, I went over there to Sergio's. And, like, since I had no shoes, you know? Sneakers, right?

A: Oh, yeah, you went to Payless Shoes.

B: So Sergio says to me, come on, let's go over there, to do some shopping. Just bring the box and we'll take off the tags, [ui] and we went out. I just went home to change my shirt and didn't even take a bath. You can

Sergio: echémonos un puro antes que salgamos para allá. Vámonos, pues, me dijo. Dos nos echamos en vez de uno. Y luego nos fuimos para allá, loco. Y me salió uno que andaba de caballero, que era de la Li También.

imagine. So I changed and said to Sergio, let's have a smoke before we go over there. All right, he said. We had two instead of one. And then we went over there, homes. And a guy who was all dressed up[9] came out, also from the Li.

A: Oh, ya sé, uno que parecía que era el dueño, ese culero.

A: Oh, I know, one that looked like the owner, that fag.

B: Y me dice: ¿Qué onda, Sirena? ¿Qué pedo?, le digo yo. Echémonos un loco, me dijo. Echémonoslo, pues, le dije. De modo que me crucé como tres, y como tres cervezas allí. Ya cuando ya entramos p'adentro yo ando un poco noqueado, pero yo sabía lo que andaba haciendo yo.

B: And he says to me, what's up Sirena? What shit?, I said. Let's do a crazy one, he said. Let's do it, I told him. So I had about three, about three beers there. So when we went in I was a bit juiced, but I knew what I was doing.

A: Pero cambiando de plática, cuando le pusiste al gringo, cuando le diste el vergazo al gringo en la cabeza, ¿andabas moteado, o qué ondas? ¿Andabas medio quemado?

A: But, changing the subject, when you gave it to the gringo, when you gave the gringo that whack on the head, were you on pot or what? Were you half stoned?

B: Sí. Andaba un poco tapirulo, viejo.

B: Yeah, I was kind of high, man.

A: Bueno, más o menos,

A: Well, did you more or less

[9] See footnote 8.

¿sabías lo que andabas haciendo?

know what you were doing?

B: Sí, ¿y yo no estaba allá metido a donde Perico, pues?

B: Yeah. Wasn't I over there at Perico's?

A: Oh, allá estabas con el Perico.

A: Oh, you were over at Perico's.

B: Sí, estaba donde el Perico cuando ustedes llegaron allí, viejo, a traernos para que fuéramos a tirar el rol por allá. Y todo fue que llegáramos allí a ese *fucking* Popeye, y nos bajamos allí viejo.

B: Yeah, I was over at Perico's when you guys got there, man, to pick us up to go throw the roll over there. And then we just arrived at that *fucking* Popeye and got out, man.

A: Y comenzamos. . . [ui]

A: And we started. . . [ui]

[end of tape]

TRANSLATION COVER

Source materials: Videotape designated "Conversación entre Reniery Alexis Espinoza Maradiaga y Julio César Osorto #2," which translated means "Conversation between Reniery Alexis Espinoza Maradiaga and Julio César Osorto #2," and bearing a notarial seal and a signature.

Source Language: Spanish

Object Language: English

Translator's Declaration

I, Raúl F. Ortiz, hereby certify that I am duly certified by the United States Courts as an interpreter and translator of the Spanish language, and that the attached document is a true and accurate translation of the above-mentioned source materials.

/s/ Raúl F. Ortiz — 27 Feb 99

Raúl F. Ortiz — date

Certified Interpreter/Translator

Translator's notes:

1. Text in italics has not been translated. It is rendered as it appears in the original text.
2. Text enclosed in brackets [] does not appear in the original text. It has been inserted by the translator to enhance comprehension.
3. The left column represents the transcription of the source text. The right column represents the translation into the object language.

4. Footnotes are not part of the source text. They are the translator's comments.

Legend:

[ui]: Unintelligible. In some cases it may only be noise that cannot be distinguished from speech.

A: Reniery Espinoza

B: Julio César Osorto

C: Person not seen in video

A: Uno, dos, trés, probando. Yo soy Reniery Espinoza, y voy a tratar de grabar a Julio César Osorto, más conocido como Sirena.

C: Reniery, Reniery, ahí viene Sirena.

A: Cerremos la puerta para tratar de colocar esta onda. [pause] ¿Qué onda?

B: Tranquilo.

A: ¿Qué te habías hecho, *man*? Puta qué bien que te encontré, *man*, hace un més que te ando buscando, *man*.

B: Por ahí he estado, *man*.

A: ¿Y solo andas, o andas con más? ¿Quiénes son esos majes?

B: Mis primos son.

A: Yo creí que ibas a venir solo, *man*. Como dijiste que nos íbamos a echar las frías, ¿qué u?

B: No, *man*, ando un poco apurado. Sólo quiero hacerte unas preguntas. Yo tengo unos parientes ahí en Virginia, *man*, que me dijeron que tenga cuidado con vos

A: One, two, three, testing. This is Reniery Espinoza, and I am going to try to record Julio César Osorto, better known as Sirena.

C: Reniery, Reniery, here comes Sirena.

A: Let's close the door to try to set up this stuff. [pause] What's up?

B: Easy.

A: Where've you been, *man*? Fuck, I'm glad I found you, *man*, I've been looking for you for a month, *man*.

B: I've been around, man.

A: And you're alone or with others? Who are those guys?

B: They're my cousins.

A: I thought you were going to come by yourself, *man*. Since you said we were going to have some beers, what's up?

B: No, *man*, I'm kind of in a hurry. I just want to ask you some questions. I have these relatives in Virginia, *man*, that told me to be careful with you because you testified in

porque vos atestiguaste en favor de aquel maje hijo de puta.

A: Ah. No fui yo, *man*. Pero no pasó nada. ¿Cómo te voy a quemar a vos yo? ¡Puta!

B: Pero vos conoces la familia de ése, *man*. Y ojalá no andes de bocón vos, hijo de puta.

A: No, *man*, sólo los conozco, y vos sos mi amigo. Mario era sólo un conocido, *man*.

B: Pero es vale verga, *man*. Algo debe estar pagando ese chavo que hizo antes.

A: No, pero yo siempre me siento mal. Vos sabés bien que él no lo hizo. Por eso yo me siento mal, loco.

B: Yo no sé. Yo creo que aquellos majes no me quemaron a mí. Porque si me hubieran quemado ya hubieran dejado libre a ese chavalo.

A: A saber, puta, qué pasa, loco. Sin paja, Mario allá está en el bote. Pero no te preocupes, *man*, Mario ya se la comió.

B: Eh, más vale que estés

favor of that fool son of a bitch.

A: Ah. It wasn't me, *man*. But nothing happened. How could I burn you? Fuck!

B: But you know that guy's family, *man*. And I hope you're not snitching, son of a bitch.

A: No, *man*, I just know them, but you're my friend. Mario was just an acquaintance, *man*.

B: But I don't fucking care, *man*. That guy must be paying for something he did before.

A: No, but I still feel bad about it. You know well that he didn't do it. That's why I feel bad, homes.

B: I don't know. I don't think those guys burned me. Because, if they had burned me they would have let that guy go.

A: Who knows, fuck, what's up, homes. No shit, Mario is in the can. But don't worry, *man*, Mario's gone.

B: Eh, you'd better go

bien, porque ya me conoces. Cualquier onda ya sabes qué pedo. Yo por eso traje a mis primos, *man*. Para que conozcan dónde vives y toda la cosa. Cualquier onda que me pase a mí ya sabes. Mejor me voy, *man*.

A: No, no te vayas.

B: Me estoy enojando, *man*. Y cuando me enojo es peligroso. Mejor me voy. Tal vez nos vemos otro día.

A: [pause] Ojalá que hayamos grabado a ese maje, porque no creo que vuelva a hablar con nosotros.

[end of tape]

straight, because you know what I'm like. Any shit and you know what's going to go down. That's why I brought my cousins, *man*. So they would see where you live and all that. Anything happens to me and you know. I'd better go, *man*.

A: No, don't go.

B: I'm getting mad, *man*. And when I get made it gets dangerous. I'd better go. Maybe we'll see each other some other time.

A: [pause] I hope we recorded that guy, because I don't think he'll talk to us again.

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto" and "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto #2", respectively.

In both videotapes, I recognized the individual facing the camera as "Sirena," the young man whom I witnessed committing the December 10, 1997 assault on another young man in Springfield, VA.

/s/ Jose Maldonado
Jose Maldonado
7116 Kerr Dr.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto" and "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto #2", respectively.

In both videotapes, I recognized the individual facing the camera as "Sirena," the young man whom I witnessed committing the December 10, 1997 assault on another young man in Springfield, VA.

/s/ Geovani Hernandez
Geovani Hernandez
6113 Amherst Ave.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto" and "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto #2", respectively.

In both videotapes, I recognized the individual facing the camera as "Sirena," the young man whom I witnessed committing the December 10, 1997 assault on another young man in Springfield, VA.

/s/ Marvin Escobar
Marvin Escobar
6124 Cumberland Ave.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Videotape No. 1" and "Videotape No. 2", respectively, and each bearing the name of Jose Maldonado and a signature.

In both videotapes, I recognized the individual facing the camera as the young man whom I witnessed committing the December 10, 1997 assault on James Merry in Springfield, VA.

/s/ Yahayra Queirolo
Yahayra Onaney Queirolo
6529 Wren Dr.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath:

Had I been advised prior to my trial of my right to confer with the Consulate of Honduras, I would have done so without delay.

/s/ Mario A. Bustillo
Mario A. Bustillo

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath:

I was present at the Popeye's Restaurant in S[p]ringfield, VA on the evening of Dec. 10, 1997 when an American young man was struck in the head.

I was leaving the restaurant when the young man, who was standing three to five meters from me, was hit in the head and fell to the ground bleeding. I could see the assailant as he struck the blow and recognized him as a young man named Julio that everyone called "Sirena." I knew Mario Bustillo at the time, but did not see him in the area that evening.

The attached photocopy of a photograph is of the assailant, Sirena.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

Several weeks after the assault, I was interviewed at the Fairfax Jail by a Fairfax detective named Perez with another detective, an older American with gray hair.

Perez spoke to me in Spanish and translated for the other man. Perez told me that he already knew who had committed the crime, Mario Bustillo, and that he did not need me to confirm that for him. I told Perez that I had not seen Mario that evening. Perez asked me to describe the whereabouts that evening of several other individuals who were on the scene. I told Perez that "Chema," "El Brujo," "Marvin el Chele," "La Vaca" and others were on the scene.

As to Mario, however, I continued to maintain I had not seen him. Perez became irate, insisting that Mario had been there. I insisted that Mario had not. Perez told me that he knew the streets and that I could not lie to him. I still would not agree that Mario had been there.

Perez told me that he knew I was illegal and that he would have me and my entire family deported. I told him to go ahead.

If Perez had not threatened to deport my family, I would have told him that Sirena had done it. As it was, I was afraid to.

I never spoke to Mario's attorney, David Bernhard, about this case. Had he asked me, I would have told him that I saw Sirena commit the crime. Had I been asked to testify at trial, I would have identified the assailant as Sirena and confirmed that the attached photocopy of a photograph was of him.

/s/ Godofredo Jimenez
Godofredo Jimenez

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

During the first hearing in late December 1997, Michele Gutierrez, Jesse Konstanty, Michele's boyfriend, Tony and I were all waiting in the area with sofas outside the courtrooms. Det. Perez was coming in and out. Tony came out of court to say that Jesse had changed his story on the stand. I got angry and got up and left before hearing how Jesse had changed his story, but Det. Perez was seated on the same couch with us and heard what Tony said.

Jesse was not in a position to see the attacker as he was facing away from James. Plus there was a large poster in the window between James and the table where Jesse, Michele and Valeria were seated. I don't think any of them could have seen who hit James. I was able to see since I was mopping the floor closer to James and at a different angle to James. Once we heard James getting hit, I screamed and Jesse got up and ran out into the parking lot and came back a couple of minutes later with his shirt in his hand and only his tank top on.

During the trial, Jesse, Michele, Valeria, Nicolas Parada and I were all kept in the same witness room. Nicolas was only there one day. The rest of us were there for the whole trial. Jesse, Michele and Valeria told the rest of us what they had testified to as soon as they came back in from court and they were talking throughout to each other and to me about their testimony. Det. Perez was coming in and out and he overheard us discussing the testimony at least four or five times. He never told Jesse, Michele or Valeria not to discuss their testimony.

Several days of the trial Det. Perez took us to lunch in the cafeteria in the courthouse or another one nearby (he accompanied us, we paid for ourselves). At lunch, we continued to discuss testimony unless someone could overhear us. The only time we refrained from discussing testimony

was when we were outside the courtroom and somebody from Mario's side would walk by.

I never testified at the trial, but I had my doubts about Mario's guilt at that point and I told Valeria so while Det. Perez was seated with us at the same table. Det. Perez told us that Nicolas was being brought from school to testify against Mario. I told Valeria that "Frijolito" (Nicolas) had told my friend Clara Castro that Mario hadn't done it and that he (Nicolas) knew that for sure. I also told Valeria that Clara had seen Mario at school the day after the attack and that he bore no signs of being punched in the face as Jesse claimed. Det. Perez pretended to look at his papers and said nothing.

About an hour and a half later, I asked Det. Perez directly why Nicolas was testifying against Mario when he'd told my friend that he knew for certain that Mario had not done it. Det. Perez just said that Mario's "own homeboys" had said he'd done it.

From the begin[n]ing, Valeria did not want to testify. After Jesse had testified, I asked Det. Perez if Valeria had to testify and [he] told Valeria in front of me that she did or she would go to jail—just say that Mario had done it. Valeria had told me earlier that she was afraid to be arrested because she had no papers to be in this country.

As I stated earlier, I was able to see the profile and clothes of the person who hit James. The attached photocopy of a photograph is of the assailant. I identified the assailant as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga. Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual. I know him as Sirena.

I know Julio a.k.a. "Sirena" because I dated him when I was younger. He used to tell me he was the leader of the Commerce Street Locos and that he would kill for Commerce. I never took him seriously because the Commerce Street Locos never did anything bad. We used to call them "Mara Pampers" (the "Pampers Gang" in English).

I initially told police that I thought Mario had done it because I had just watched Jesse and Michele telling the police that it was Mario. Also, I had only seen Mario and Nicolas wearing red that day, but Nicolas had a white swatch on his pullover. Also, Cristina had been outside with James and said it was Mario. I did tell the police that the assailant had shoulder length hair. Mario had too when I last saw him up close several weeks earlier. Clara went to school with Mario and told me, however, that his hair was short by the time of the crime. I'd seen Mario at Popeye's earlier that evening, between 4:30 and 5:30, but only from a distance and in the dark. He was in the area of the parking lot at that point as were a number of other boys. Everyone left after I swore at one of them and told him to take his friends and leave. When they came back one to two hours later, I did not notice that Mario and a couple of others were with them. Mario, in fact, may have been just coming or going when I saw him. When I spoke to the police, I assumed that he had returned even though I had not seen him, because Jesse and Michele said it was him and so had Cristina.

/s/ Claudia Tafur
Claudia Tafur

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I testified truthfully at the trial of Mario Bustillo when I stated that I had observed the attack on James on Dec. 10, 1997 at the Popeye's in Springfield, VA and that Mario Bustillo was not the assailant.

I had told Det. Cline in court at the Preliminary Hearing that Mario Bustillo did not look like the person I saw commit the assault.

I said this to Det. Cline because it was the truth. I had never met Mario Bustillo's father at that point and did not meet him until several days later on New Year's.

Mr. Bustillo never suggested to me that I should testify to any particular fact and I never understood him to want me to testify other than truthfully. I repaid his loan of $150 shortly after Mario Bustillo's trial and I never felt myself bound by virtue of the loan or of the $20 gift for food for my little girl to tell other than the truth.

After I told Det. Cline that Mario Bustillo did not look like the assailant, Det. Perez called my house more times than I can remember and left me notes. I took one of his telephone calls and told him I had told Det. Cline the truth. He told me to stop lying and that he was going to have me imprisoned and deported if I kept lying when I went to court.

He repeated this threat twice in person when he put me in his car against my stated will, once alone and once with Det. Cline.

The subject of the attached photocopy of a photograph resembles the person who struck James. James' attacker had longer hair. I identified him as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Esmirna Cristina Hondoy
Esmirna Cristina Hondoy

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

The attached photocopy of a photograph is of the young man named Julio whom I observed on the evening of December 10, 1997 outside the Popeye's Restaurant in Springfield, VA with a bat in his hand.

I identified Julio as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

Following my sworn declaration in August 1998, I found Officer Gelabert in the satellite police station that he frequented. He indicated that he had been required to attend a court hearing because of my statement and that I should not involve myself in a case that is already closed. He stated that otherwise, I could create serious problems for myself and could end up in jail.

On other occasions Officer Gelabert has told me that he regrets that he was not in charge of the investigation, because he knew that Julio "La Sirena" had committed the crime. Officer Gelabert also told me he tried to apprehend Julio several days after the crime, but that Julio had escaped.

/s/ Amilcar Lagos
Amilcar Lagos

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

[seal omitted]

EMBAJADA DE HONDURAS
SECCION CONSULAR

1528 K Street, N.W. • 2nd Floor
Washington, D.C. 20005
(202) 737-2972 / 78 • FAX (202) 737-2907
e-mail: consul.hondurasdcusa@verizon.net

AFFIDAVIT

I hereby declare under oath:

I am the person in charge of the Honduran Consular Section of the Embassy of Honduras in Washington, D.C.

The records of the Office of the Population and Migration Policy of the Republic of Honduras reflect that a young man named "Julio" arrived in Tegucigalpa, Honduras on Continental Flight 769 on December 17, 1997 and that he is a Honduran citizen and his full name is JULIO CESAR OSORTO HERRERA. Attached, a copy of the pertinent portion of the aforementioned records, certified as correct by the custodian of said records whose certification is certified by the person to whom said custodian reports.

The records of the National Registry of Persons of the Republic of Honduras reflect that Mr. Osorto Herrera's National Identity number is 0801-1976-05566 and include, along with other biographical data, his fingerprint and photography submitted to the Registry by Mr. Osorto Herrera on January 13, 1998. Attached, a copy of the pertinent portion of these Records certified as correct by the custodian of said records whose certification is certified by the person to whom said custodian reports.

As previously stated by my predecessor, Yolanda Membreño Castellanos, this Consulate had no knowledge, prior to his trial, of the murder charge against Honduran Citizen Mario A. Bustillo that led to his trial in the Fairfax County (Virginia) Circuit Court in March, 1998. Had this Consulate

been so informed prior to the trial, it would have endeavoured to help Mr. Bustillo in his defense. This help would, at the very least, have included providing him the attached records as Certified.

[seal omitted] /s/ David Alfonso Hernández Caballero
Mr. David Alfonso Hernández Caballero
Nov. 28, 2001

[notary aeknowledgement]

DIVISION DE SISTEMAS DE INFORMACIÓN
MOVIMIENTO MIGRATORIO ANORMAL
97

Nombre de Viajero:	OSORTO HERRERA, JULIO CESAR
Nacionalidad:	HONDURAS
Pals de Procedencia:	ESTADOS UNIDOS
Tipo de viajero:	NACIONAL
Sexo:	MASCULINO
Edad:	21 Años
Direccion:	
COL. LAS	AYESTAS COMAYAGUELA
Empresa que Viaia:	CONTINENTAL
Salida ó Entrada:	ENTRADA
Fecha de cierre:	17 DIC. 97
Inspector Atendio:	OLGA MARINA ARITA VILLEDA
Clave:	AU
Numero de Boleta:	17533523
Documento de viaje:	686485
Delegacion:	TONCONTIN
Observaciones:	ANORMAL
Transcriptora:	MM

El Suscrito Jefe de La División de Sistemas de Información de La Dirección General de Población y Política Migratoria, Certifica como correcta la Impresión de MOVIMIENTO MIGRATORIO del Señor **JULIO CESAR OSORTO HERRERA**, SELLO Y FIRMA JOSE ALEJO CHANG, JEFE DE LA DIVISION DE SISTEMAS DE INFORMACION." Tegucigalpa., M.D.C., 08 de marzo del año 2001.

[seal] [signature] [seal] [sigature]

Ex. 26a

[seal omitted]

MINISTERIO DE GOBERNACION Y JUSTICIA

DIRECCION GENERAL DE POBLACION

APARTADO POSTAL 494 — TEGUCIGALPA, M. D. C.

C E R T I F I C A C I O N

El Infrascrito, Secretario general de la Dirección General de Población y Política Migratoria, CERTIFICA lo siguiente: El Suscrito Jefe de La; División de Sistemas de Información de la Dirección General de Población y Política Migratoria, CERTIFICA como correcta la Impresión de MOVIMIENTO MIGRATORIO del señor **JULIO CESAR OSORTO HERRERA**, SELLO Y FIRMA JOSE - ALEJO CHANG, JEFE DE LA DIVISION DE SISTEMAS DE INFORMACIÓN." Tegucigalpa M.D.C., 08 de marzo del año 2001.

Extendida en la Ciudad de Tegucigalpa, Municipio del Distrito Central, a los ocho días del mes de marzo del año dos mil uno.

[signature] [seal]

LIC. RAMON ROSA SANCHEZ, DORMES
SECRETARIO GENERAL.

AUTENTICA.

N° 2662-2001

El Infrascrito Secretaría General de la Secretaría de Gobernación y Justicia. debidamente autorizado CERTIFICA: que es auténtica la firma que antecede y dice:

RAMON ROSA SANCHEZ DORMES

puesta en su carácter de SECRETARIO GENERAL DE LA DIRECCION GENERAL DE POBLACION.

Tegucigalpa, M.D.C. 12 de MARZO de ANO 2001

[seal]

[seal] [signature]

RICARDO LARA WATSON
SECRETARIO GENERAL

[seal] [seal]

mjm.

V.B. [signature] [seal]
SECCION DE AUTENTICAS

[seal] [rubber stamp]

SECRETARIA DE RELACIONES EXTERIORES

No. 6756

El infrascrito, Secretario General de la Secretaría de Estado en el Despacho de Relaciones Exteriores Debidamente Autorizado.

CERTIFICA: que es auténtica la firma que antecede y dice:
RICARDO LARA WATSON

Puesta en su carácter de: SECRETARIO GENERAL DE LA SECRETARIA DE GOBERNACIÓN Y JUSTICIA.

Tegucigalpa, M.D.C., 14 de MARZO de 2001.

[signature] [seal]

ARMANDO ROMERO CLAUDINO
ASISTENTE DE LA SECRETARIA GENERAL
ADSCRITO A LA OFICINA DE AUTENTICAS

SPECIFIC AUTHENTICATION CERTIFICATE

REPUBLIC OF HONDURAS	)	
CENTRAL DISTRICT	)	
CITY OF TEGUCIGALPA	)	SS.
EMBASSY OF THE UNITED	)	
STATES OF AMERICA	)	

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of the country of venue to execute that document.

ARMANDO ROMERO CLAUDINO

(SEAL)

/s/ John M. Jones
JOHN M. JONES
Consul General of the
United States of America
March 20, 2001

Statement of Translator

Source Document: Five (5) pages of official documents from various government agencies in Honduras, concerning certain travel transactions of Julio Cesar Osor{t}o Herrera

Object Document: Five (5) page translation of the source document

I, Raúl F. Ortiz, hereby certify that I am certified as an Interpreter/Translator of the Spanish language by the Courts of the United States, and that the following document is a true and accurate translation from Spanish into English of the above-listed source document.

/s/ Raúl F. Ortiz — 4 January 2002
Raúl F. Ortiz — date
Certified Interpreter/Translator
for the United States Courts

Translator notes:

1. Text in italics appears in English in the source document. It has not been translated.
2. Text in brackets does not appear in the source document. It has been added to enhance comprehension.

GENERAL BUREAU OF POPULATION AND TRAVEL
INFORMATION SYSTEMS DIVISION
NON-STANDARD TRAVEL TRANSACTION

Name of Traveler:	OSORTO HERRERA, JULIO CESAR
Nationality:	HONDURAS
Country of Origin:	UNITED STATES
Type of Traveler:	NATIONAL
Sex:	MALE
Age:	21 years
Address:	
COL. LAS	AYESTAS COMAYAGUELA
Travel Carrier:	CONTINENTAL
Exit or Entry:	ENTRY
Closing date:	17 Dec. 97
Attending Inspector:	OLGA MARINA ARITA VILLEDA
Key:	AU
Ticket Number:	17533523
Travel Document:	686485
Delegation:	TONCONTIN
Observations:	NON-STANDARD
Transcriber:	MM

The undersigned Chief of the Information Systems Division of the General Bureau of Population and Travel, hereby Certifies as true the record of TRAVEL TRANSACTION of Mr. JULIO CESAR OSORTO HERRERA, STAMPED AND SIGNED BY JOSE ALEJO CHANG, CHIEF OF THE INFORMATION SYSTEMS DIVISION." Tegucigalpa, M.D.C., March 8, 2001.

[rubber stamp] [signature] [rubber stamp] [signature]

DEPARTMENT OF JUSTICE
GENERAL BUREAU OF POPULATION
POST OFFICE BOX 949 – TEGUCIGALPA, M.D.C.

[round seal]

GENERAL BUREAU OF POPULATION
AND TRAVEL, HONDURAS

CERTIFICATION

The undersigned Secretary General of the General Bureau of Population and Travel, hereby CERTIFIES the following: The undersigned chief of the Information Systems Division of the General Bureau of Population and Travel, hereby CERTIFIES as true the record of TRAVEL by Mr. JULIO CESAR OSORTO HERRERA, sealed and signed by JOSE ALEJO CHANG, CHIEF OF THE INFORMATION SYSTEMS DIVISION." Tegucigalpa, M.D.C., March 8, 2001.

Issued at the City of Tegucigalpa, Municipality of the Central District, on this eighth day of the month of March of the year two thousand and one.

[rubber stamp] [rubber stamp] [signature]

RAMON ROSA SANCHEZ DORMES
SECRETARY GENERAL

AUTHENTICATION

No. 2662-2001

The undersigned duly authorized Secretary General of the Department of Justice hereby CERTIFIES: that the foregoing signature is authentic and reads as follows:

RAMON ROSA SANCHEZ DORMES

Subscribed in his capacity as SECRETARY GENERAL OF THE GENERAL BUREAU OF POPULATION

Tegucigalpa, M.D.C. March 12, 2001

THIS OFFICE DOES NOT TAKE RESPONSIBILITY FOR THE CONTENTS OF THIS DOCUMENT

[round rubber stamp] [signature]

RICARDO LARA WATSON
SECRETARY GENERAL

[rubber stamp:] AUTHENTICATION
#6756
SECRETARY OF FOREIGN RELATIONS

Cert. [signature]
AUTHENTICATION
SECTION

[Inside a triple-bordered box:]
THIS OFFICE DOES NOT TAKE
RESPONSIBILITY FOR
THE CONTENTS OF THIS
DOCUMENT

[glue-on stamp] [rubber stamp over glue-on]

SECRETARY OF FOREIGN RELATIONS

No. 6756

The undersigned Secretary General of the Department of State at the Duly Authorized Office of Foreign Relations.

CERTIFIES: that the foregoing signature is genuine and reads as follows: RICARDO LARA WATSON

Subscribed in his capacity as: SECRETARY GENERAL OF THE JUSTICE DEPARTMENT.

Tegucigalpa , M.D.C., March 14, 2001.

[signature]

[rubber stamp]

ARMANDO ROMERO CLAUDINO
ASSISTANT SECRETARY GENERAL
ATTACHED TO THE OFFICE OF
AUTHENTICATIONS

SPECIFIC AUTHENTICATION CERTIFICATE

REPUBLIC OF HONDURAS	)	
CENTRAL DISTRICT	)	
CITY OF TEGUCIGALPA	)	*SS.*
EMBASSY OF THE UNITED	)	
STATES OF AMERICA	)	

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of the country of venue to execute that document.

ARMANDO ROMERO CLAUDINO

(SEAL)

[signature]
JOHN M. JONES
Consul General of the
United States of America
March 20, 2001

Statement of Translator

Source Document: Five (5) pages of official documents from various government agencies in Honduras, confirming the identity of Julio Cesar Osor[t]o Herrera

Object Document: Five (5) page translation of the source document

I, Raúl F. Ortiz, hereby certify that I am certified as an Interpreter/Translator of the Spanish language by the Courts of the United States, and that the following document is a true and accurate translation from Spanish into English of the above-listed source document.

/s/ Raúl F. Ortiz — 4 January 2002

Raúl F. Ortiz — date
Certified Interpreter/Translator
for the United States Courts

Translator notes:

1. Text in italics appears in English in the source document. It has not been translated.
2. Text in brackets does not appear in the source document. It has been added to enhance comprehension.

[photograph]

NAME	JULIO CESAR OSORTO HERRERA
IDENTITY	0801-1976-05566
PLACE AND DATE OF BIRTH	08 01 NOVEMBER 25, 1976
MARITAL STATUS	SINGLE
OCCUPATION	STUDENT
FATHER	VICENTE OSORTO
MOTHER	MARIA IGNACIA HERRERA
ADDRESS	F.M., D.C., BO. LOS PROFESORES
PHOTOGRAPH AND PRINT	JANUARY 13, 1998

[finger print] [finger print] [signature]

RIGHT INDEX LEFT INDEX

NOTE: THE PHOTOGRAPH AND PRINT ARE STORED AT THE A.F.I.S. SYSTEM

CERTIFICATION

The undersigned Director of the National Identification Program (NIP), Walter Castellanos, Esq., hereby **CERTIFIES** that the photograph, prints and demographic information printed in the attached signed and stamped sheet are copies of the original kept in the files of the AFIS computer system concerning Mr. **JULIO CESAR OSORTO HERRERA**.

Issued in the City of Tegucigalpa, Municipality of the Central District, on the sixth day of the month of March of the year two thousand and one.

[rubber stamp]

[signature]

Walter Castellanos, Esq.
Executive Director

Cert. [signature]

DAGOBERTO CASTELLANOS LANZA
DIRECTOR, N.R.P.
NATIONAL REGISTRY OF PERSONS

AUTHENTICATION

No. 22834-2001

The undersigned Senior Officer of the National Court of Elections, hereby CERTIFIES: That the foregoing signature executed by: Dagoberto Castellanos General Director of the National Registry of Persons is genuine, who in turn authenticates the signature of: _____ Civil Registrar of the municipality of: C. D. Department: Fco. Morazán, subscribing the Certification of: prints photograph of Julio Cesar Osorto Herrera.

TEGUCIGALPA, M.D.C. March 8, 2001

[rubber stamp] [signature]

JOSE RUBEHÍN HERNÁNDEZ VEGA
SENIOR OFFICER OF THE N.C.E.

AUTHENTICATION [partial rubber stamp]

2663-2001

The undersigned Secretary General of the Department of Justice [Spanish: Secretaría de Gobernación y Justicia], being duly authorized, hereby CERTIFIES: that the foregoing signature is genuine and reads as follows: JOSE RUBEIIIN HERNANDEZ VEGA subscribed in his capacity as SENIOR OFFICER OF THE NATIONAL COURT OF ELECTIONS IN AUTHENTICATION No. 22834-2001

Tegucigalpa, M.D.C. March 12, 2001

THIS OFFICE DOES NOT TAKE RESPONSIBILITY FOR THE CONTENTS OF THIS DOCUMENT

[stamp] [signature]

RICARDO LARA WATSON
SECRETARY GENERAL

[rubber stamp:] AUTHENTICATION
#6755
SECRETARY OF FOREIGN RELATIONS

Cert. [signature]

[Inside a triple-bordered box:]

AUTHENTICATION SECTION

THIS OFFICE DOES NOT TAKE RESPONSIBILITY FOR THE CONTENTS OF THIS DOCUMENT

[glue-on stamp] [rubber stamp over glue-on]

SECRETARY OF FOREIGN RELATIONS

No. 6755

The undersigned Secretary General of the Department of State at the Duly Authorized Office of Foreign Relations.

CERTIFIES: that the foregoing signature is genuine and reads as follows: RICARDO LARA WATSON

Subscribed in his capacity as: SECRETARY GENERAL OF THE JUSTICE DEPARTMENT.

Tegucigalpa, M.D.C., March 14, 2001.

[signature]

[rubber stamp]

ARMANDO ROMERO CLAUDINO
ASSISTANT SECRETARY GENERAL
ATTACHED TO THE OFFICE OF
AUTHENTICATIONS

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted] [fingerprint omitted]

DERECHA INDICE IZQUIERDA INDICE

[seal omitted] [signature omitted]

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

CERTIFICACION

El infrascrito Gerente del Programa de Identificación Nacional (PIN) Lic. Walter Castellanos, **CERTIFICA**, que la foto, huellas y datos demográficos impresos en hoja adjunta, sellada y firmada son copia del original que se encuentra en el archivo del sistema de computo AFIS del Ciudadano **JULIO CESAR OSORTO HERRERA.**

Dado en la ciudad de Tegucigalpa, Municipio del Distrito Central, a los seis días del mes de Marzo del dos mil uno.

[seal omitted] [signature omitted]

Lic. WALTER CASTELLANOS

Gerente Ejecutivo

[seal omitted]

Vto. Bno. /s/ Castellanos

LIC. DAGOBERTO CASTELLANOS LANZA
DIRECTOR, R.N.P.
REGISTRO NACIONAL DE LAS PERSONAS

AUTENTICA

N° 22834-2001

El Infrascrito OFICIAL MAYOR del Tribunal Nacional de Elecciones, CERTIFICA: Que la firma que antecede puesta por: Dagoberto Castellanos Director General del Registro Nacional de las Personas es auténtica, quien a su vez autentica la firma de: _____ Registrador Civil del Municipio de: D. C. Departamento: Fco. Marzán puesta en la Certificación de: foto de huellas de, Julio Cesar Osorto Herrera.

TEGUCIGALPA, M.D.C. 8 de Marzo de 2001

[stamp omitted] [signature omitted]

JOSE RUBEHÍN HERNÁNDEZ VEGA
OFICIAL MAYOR DEL T.N.E.

AUTENTICA.

N° 2663-2001

El Infrascrito Secretaría General de la Secretaría de Gobernación y Justicia. debidamente autorizado CERTIFICA: que es auténtica la firma que antecede y dice:

JOSE RUBEHIN HERNANDEZ VEGA

puesta en su carácter de OFICIAL MAYOR

DEL TRIBUNAL NACIONAL DE ELECCIONES

EN LA AUTENTICA No. 22834-2001

Tegucigalpa, M.D.C. 12 de MARZO de ANO 2001

[seal omitted]

[seal omitted] [signature omitted]

RICARDO LARA WATSON
SECRETARIO GENERAL

[seal omitted]

mjm.

V.B. [signature omitted] [seal omitted]
SECCION DE AUTENTICAS

[seal omitted] [stamp omitted]

SECRETARIA DE RELACIONES EXTERIORES

No.6755

El infrascrito, Secretario General de la Secretaría de Estado en el Despacho de Relaciones Exteriores Debidamente Autorizado.

CERTIFICA: que es auténtica la firma que antecede y dice:
RICARDO LARA WATSON

Puesta en su carácter de: SECRETARIO GENERAL DE LA SECRETARIA DE GOBERNACIÓN Y JUSTICIA.

Tegucigalpa, M.D.C., 14 de MARZO de 2001.

[signature omitted] [seal omitted]

ARMANDO ROMERO CLAUDINO
ASISTENTE DE LA SECRETARIA GENERAL
ADSCRITO A LA OFICINA DE AUTENTICAS

SPECIFIC AUTHENTICATION CERTIFICATE

REPUBLIC OF HONDURAS)
CENTRAL DISTRICT)
CITY OF TEGUCIGALPA) SS.
EMBASSY OF THE UNITED)
STATES OF AMERICA)

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of the country of venue to execute that document.

ARMANDO ROMERO CLAUDINO

(SEAL OMITTED)

/s/ John M. Jones
JOHN M. JONES
Consul General of the
United States of America
March 20, 2001

AFFIDAVIT

Further to my affidavit of May 21, 1998, I hereby state under oath:

The attached photocopy of a photograph is of Sirena.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

Sirena was wearing a red garment on his upper body when he committed the attack. He may also have been wearing a black cap without a bill or visor and a jacket, but the red garment or pullover was what I noticed as he committed the attack.

I was available to be interviewed prior to the trial. Had Mario Bustillo's attorney or the police asked me before the trial, I would have stated that I saw Sirena commit the crime.

Had I been asked to testify at trial, I would have identified the assailant as Sirena and confirmed that the attached photocopy of a photograph was of him.

This affidavit is also further to my two affidavits of January 27, 1999.

/s/ Jose Maldonado
Jose Maldonado

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I hereby state under oath:

I am known by the nickname "Brujo."

I was present at the Popeye's Restaurant in S[p]ringfield, VA on the evening of Dec. 10, 1997 when an American young man was struck in the head.

I was roughly 2 meters from the young man as he was hit in the head and fell to the ground. The assailant wore a red sweater or similar garment. I could see the assailant as he struck the blow and recognized him as a young man named Julio that everyone called "Sirena." I knew Mario Bustillo at the time, but did not see him in the area that evening.

The attached photocopy of a photograph is of the assailant, Sirena.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

I was questioned by Det. Perez and a colleague later that evening. Det. Perez insisted Mario was the culprit. I admitted being on the scene, but said I had not seen Mario. I did not tell them that I had seen the attack or that Sirena had committed it.

I was also interviewed by Mario's attorney prior to the trial. As with the police, I said only that I had been there and had not seen Mario.

/s/ Jorge Maldonado
Jorge Maldonado

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

The attached photocopy of a photograph is of "Sirena."

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Marvin Escobar
Marvin Escobar
7216 Commerce St., Apt. 101
Springfield, VA 22150

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I hereby state under oath:

The attached photocopy of a photograph is of Sirena, the person who grabbed a bat from me in the Popeye's parking lot in Springfield, VA on the evening of December 10, 1997.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga. Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

On the evening of Dec. 10, 1997, Jesse and a friend were inside the Popeyes. Prior to that evening, Jesse had made a habit of seeking out with his Mara Li friends those that lived around Commerce Street and belonged to the Commerce Street Locos. Upon finding one alone, Jesse and his friends would beat him with bats. Prior to that evening, Amilcar ("Perico") and Alex Rios were beaten by Jesse and his friends in this fashion.

On the evening of Dec. 10, 1997, I and the other Commerce Street Locos were seeking to have Jesse come outside and fight one of us—[one] on one. Jesse was not used to those odds and refused to come outside, but someone, probably Valeria, came outside and said she was calling other members of Mara Li. The bat was produced and handled by us in order to protect ourselves from the Mara Li. To my knowledge, nobody planned to use the bat on Jesse or his friend. What we wanted was to see Jesse get his face beaten in by fists in a fair fight.

/s/ Lisandro Parada
Lisandro Parada

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

Further to my earlier affidavits and testimony on this matter, I hereby state under oath:

I stand by my earlier affidavits.

When I was cross examined by the prosecutor on June 17, 1998, I answered "Yes" when he asked me if I had identified Mario as the attacker to the police the night of the offense. I did not understand the question. I was never interviewed the night of the offense and when I finally was interviewed by Det. Cline at my house, I said that I thought it was a guy named "Mario" and that my reason for so thinking was because Valeria had told me so. I had never seen a picture of Mario Bustillo at that point and did not realize until going to court before New Year's 1998 that the accused was someone I knew as "Masiso."

The attached photocopy of a photograph is of the young man whom I observed on the evening of December 10, 1997 outside the Popeye's Restaurant in Springfield, VA strike James Merry in the head with a bat. I have no question, but that he is the one who did it.

I identified him as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

I also know who he is. He used to be called "Sirena," but the night of the attack I only knew he looked familiar without remembering specifically why. When I saw him in the group photograph that Mr. Kiyonaga showed me when I made my first affidavit and when I saw him in the videotape that Mr. Kiyonaga later showed me, I realized he looked familiar because he had gone out with one of my girlfriends.

I thought I recalled his nickname as "Sirena," but wasn't sure because it means mermaid. I thought that maybe I was mistaken and he was actually called "Sereno," which means serene, or "Zorino," which means fox, so I did not let on. I had already seen one person wrongly convicted of the crime. I did not want to say a name that was close, but not correct, and get a second person in trouble by mistake. Now, almost everyone who talks about the crime says "Sirena" did it and I realize that I correctly remembered the name he went by.

When I was at court before New Year's 1998 and told Det. Cline that Jesse Konstanty was lying when he said he chased James' attacker, I was referring to the fact that Jesse came out of the restaurant and made a purely token effort to run after the people that were fleeing. He didn't go more than 10 feet. Jesse was a friend of mine and I knew him to be brave only when he had several friends with him and he was picking on one guy. Running alone after one guy, much less a number of guys, was not his style.

Jesse was also lying when he testified that he hit the attacker and I told Det. Cline this. Jesse never caught up with anyone and did not appear to want to.

Jesse was also lying when he testified at the same hearing that he wasn't in a gang. I knew he belonged to Mara Li and told Det. Cline so.

/s/ Yahayra Queirolo
Yahayra Queirolo

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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FOTO Y HUELLA	13 DE ENERO DE 1998

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DERECHA INDICE

[fingerprint omitted]
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NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

As I testified at Mario Bustillo's trial, I was present at the Popeye's Restaurant in S[p]ringfield, VA on the evening of Dec. 10, 1997 when an American young man was struck in the head.

I was roughly 3 or 4 meters from the young man as he was hit in the head and fell to the ground. The assailant wore a red sweater or similar garment and a black cap without a visor. I could see the assailant as he struck the blow and recognized him as a young man named Julio that everyone called "Sirena." The victim had come out and lit a cigarette in front of a big sign in the window and appeared to be laughing at us[.] The blow happened very fast and surprised me. We had humiliated the victim and Jesse in front of the girls they were with inside the restaurant and I thought we were just leaving.

The victim's friend, Jesse, came out of the restaurant and went to the victim and then ran yelling very briefly in the direction of the people fleeing the scene, but did not appear to be chasing anyone in particular. Jesse then returned to the victim.

I knew Mario Bustillo at the time, but did not see him at any time that evening. Mario's hair at the time was shorter than Sirena's.

The attached photocopy of a photograph is of the assailant, Sirena. I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga. Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Amilcar Amaya
Amilcar Amaya

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I hereby state under oath:

The attached photocopy of a photograph is of the young man whom I knew as "Sirena" and whom I observed on my flight to Honduras on Dec. 17, 1997 as I testified at the trial of Mario Bustillo.

I identified him as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Ulma Martinez
Ulma Martinez

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
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NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

AFFIDAVIT

THE AFFIANT, RICHARD PEREZ, FIRST BEING DULY SWORN, STATES AS FOLLOWS:

1. I have been a Detective with the Fairfax County Police since 1997. I was assigned, along with Detective Richard Cline, to investigate the assault of James Merry. I base this affidavit on my recollection and a review of investigative notes.

2. Mario Bustillo alleges that I threatened various witnesses with jail or deportation if they did not identify Mario Bustillo as the person who attacked James Merry. He also alleges that I harassed certain witnesses. I never made any such threats, nor did I harass or pressure anyone. It has never been my practice to intimidate witnesses or to threaten deportation. In a criminal investigation, it is important to gain the trust of the witnesses. That sense of trust would never be gained by making threats or by trying to intimidate witnesses. I do not have any involvement with deportation matters. Finally, I do not and did not try to discourage anyone from talking to defense attorneys.

3. I did not make any threats to Valeria Landaeta or tell her to "just say that Mario did it." She was a reluctant witness who would have preferred not to be involved. My notes also reflect that within minutes of the incident she, along with Claudia Tafur, identified Mario Bustillo as the suspect and both of them took detective Michele Dubois to show her where Mario lived.

4. I never threatened Lisandro or Nicolas Parada with jail if Lisandro refused to say that Mario took the bat from him. Lisandro never told me that Mario never took the bat from him. My notes show that Lisandro was interviewed at the Bryant school on January 6, 1998. His statements were vague and his memory selective. He tried to distance himself from the event and said he never saw the actual assault.

5. With regard to Godofredo Jimenez, I made no threats to him. We interviewed him on January 7, 1998, at the adult detention center. My notes reflect that he named those who were present at the scene of the assault. He never said that Mario was not there. To the contrary, he told us Mario was there. He said that he saw people running, but did not see the actual assault.

6. Claudia Tafur never told me that Nicolas Parada had informed her that he knew for certain that Mario had not done it. Nor did she ever tell me that Clara Castro had seen Mario after the attack and he showed no sign of having been struck.

7. I never made any threats of jail or deportation to Yahayra Quierolo. I deny ever harassing Esmirna Hondoy.

8. I do not recall whether I was in the same room as Jesse Konstanty, Michele Gutierrez and Valeria Landaeta during Mario's trial. Witnesses are usually out in the hallway rather than in a separate room. I do not recall observing any conversation between these witnesses. If I had, I certainly would have stifled their conversation immediately, and brought it to the attention of the Commonwealth's Attorney to remedy the issue.

Respectfully submitted,

/s/ Richard Perez

Richard Perez

[notary acknowledgement]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX, TO-WIT:

THE AFFIANT, RICHARD J. CLINE, FIRST BEING DULY SWORN, STATES AS FOLLOWS:

1. I have worked for the Fairfax County Policy since 1980. I have been a detective since 1983. On December 10, 1997, I was a criminal investigator in the Homicide Branch of the Fairfax County Policy. I investigated, with Detective Richard Perez, the murder of James Merry. I have reviewed my investigative notes in preparing to respond to the allegations made by Mr. Bustillo.

2. Concerning Valeria Landaeta, I never told her that she had to say the same thing (implicating Mario Bustillo) at trial. I told her to tell the truth and to say what she saw. I never made any threats to her or to anyone else. Landaeta was afraid of the gang members. She was placed under police protection because she had been threatened and intimidated by the Commerce Street Locos.

3. After the attack occurred, my notes reflect that I arrived at the scene around 11:30 p.m. There were many potential witnesses at the Franconia Station. It is quite probable that we interviewed Jesse Konstanty and Michelle Gutierrez together initially. Our first task that night was to form a quick synopsis of the basic facts: who the witnesses were and what they knew. Once they gave us that information, we took their names and some other information and contacted them later on an individual basis. The substation at Franconia is small. It would not be feasible to separate all the witnesses into different rooms. I categorically deny any allegation that I coached witnesses.

4. At the preliminary hearing, Yahayra Queirolo told me that she was not sure that Mario was the same guy who attacked James Merry. Her statement was definitely equivocal. I immediately brought her statement to the attention of Mr. Sanders. I never threatened her with prison and never called her mother. Nor did I try to discourage her from speaking with defense counsel.

5. We spoke with Jose Amaya Canas on January 7, 1998. According to my notes, he named individuals who were there when the attack took place. He said that Sirena and Mario had baseball bats. He described Mario's and Sirena's clothing. He heard Mario say something to the effect of "let's hit him." We took him back to the crime scene and he showed us where he was st[illegible]ng when the assault occurred. His view was obstructed by a brick pillar. He said that Sirena was behind Mario and he could not see who actually hit the victim.

6. Michele Gutierrez' boyfriend never told me at the preliminary hearing that Jesse Konstanty's testimony contradicted his original version of the events.

7. I never received any photograph of Sirena. Before trial, we were not even sure if Sirena was a real person. To

the best of my knowledge we have no identifiers on Sirena and I am still unsure as to his true identity.

8. I had no involvement with any deportation procedures. Nor did I threaten anyone with deportation. The facsimile cover sheet shows that another division of the Fairfax County Policy Department, the gang unit, sent that fax to the Immigration and Naturalization Service. I would not have wanted Canas deported because his statement was favorable to the Commonwealth. He actually placed Bustillo at the scene—which contradicted Bustillo's affidavit. He did not make any statements that exculpated Mario Bustillo.

Respectfully submitted,

/s/ Richard J. Cline

Richard J Cline

[notary acknowledgement]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

MEMORANDUM OPINION

This case is before the Court on Petitioner's Application for a Writ of Habeas Corpus pursuant to § 8.01-654 *et seq.* of the Code of Virginia.

On January 20, 1998, a Fairfax County grand jury indicted Mario Bustillo (hereinafter Petitioner) for first degree murder. On March 20, 1998, a jury found Petitioner guilty of first degree murder and sentenced him to thirty (30) years in the penitentiary. On June 12, 1998, Petitioner made a motion to set aside the verdict. After an evidentiary hearing, Judge Gerald Bruce Lee denied Petitioner's Motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied on April 11, 2000. Petitioner then appealed the case to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court denied Petitioner's writ of certiorari on June 4, 2001. This Petition follows.

Petitioner claims that the Commonwealth engaged in several acts of prosecutorial misconduct. Petitioner also contends that his trial counsel was so ineffective as to amount to a violation of the protections afforded to him by the United States Constitution.

I. FACTS OF THE UNDERLYING CONVICTION AND APPEAL

The evidence in the underlying criminal action revealed that on or about the night of December 10, 1997, James Merry was struck in the head by another young man with a baseball bat in the parking lot of a Popeye's Restaurant in Springfield, Virginia. Merry died several days later. The Petitioner was later arrested and charged with murder based on the statements of several individuals who witnessed the incident.

At trial, each witness identified Petitioner as the assailant based on their past knowledge of him from the local high school and their recollection of the assailant's clothes that night—a red sweater or jacket. Additionally, the Commonwealth produced witnesses linking Petitioner to a group of Hispanic men who allegedly belonged to a gang called the "Commerce Street Locos."

Petitioner's evidence consisted of six witnesses, including a female who was standing next to the decedent when he was struck. She testified that Petitioner was not the assailant. Additional defense witnesses corroborated her testimony and further indicated that another individual named "Sirena" was responsible for the assault.

II. PROSECUTORIAL MISCONDUCT

Petitioner's first claim is prosecutorial misconduct. He specifically alleges the following:

(1) The Commonwealth failed to disclose exculpatory evidence;

(2) The Commonwealth engaged in improper and suggestive witness coaching;

(3) The Commonwealth threatened and intimidated witnesses in exchange for incriminating testimony;

(4) The Commonwealth failed to inform Petitioner of his Vienna Convention rights;

(5) The Fairfax County Police had improper contact with a member of the jury; and

(6) The Commonwealth prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

III. LEGAL ANALYSIS

Petitioner alleges in essence that the Commonwealth engaged in a course of prosecutorial misconduct consciously calculated to convict the wrong defendant. However, many of Petitioner's prosecutorial misconduct claims are procedurally barred. The seminal case establishing the standard of review in a habeas corpus proceeding states that a habeas petition is not an appellate substitute. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975). When claims are available or are adjudicated at trial or on appeal, a Petitioner may not raise the issues again in a habeas corpus petition. *Id.* at 29-30.

Specifically, Petitioner contends that the Commonwealth, including the Fairfax County Police Department, wrongly suppressed exculpatory evidence and engaged in unlawful and prejudicial conduct. However, Virginia law precludes Petitioner from litigating or relitigating claims that could have been raised and argued at trial or during the appellate process. *See Slayton*, 215 Va. at 29-30. In addition, "absent a change of circumstances, previous determination of the issues by . . . state . . . courts will be conclusive" in a habeas review. *Hawks v. Cox*, 211 Va. 91, 95 (1970). Moreover, prisoners are denied further relief if they state no new claims or try to reengage allegations that were resolved against them in the appellate process. *Id.*

Petitioner also urges that numerous witness recantations, evidence of alleged perjured testimony, and recently altered witness recollections be admitted to prove his innocence. However, the existence of newly discovered evidence arguably relevant to guilt is not a ground for habeas relief, and may not be considered by the Court. *See Fitzgerald v. Bass*, 6 Va. App. 38, 46 (1988) (witness recantations not a basis for relief).

A. Exculpatory Evidence Claim

The standard of review applicable to allegations of wrongful suppression of exculpatory evidence is rooted in the case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). If evidence favorable to a defendant is material to the defendant's guilt, regardless of the prosecution's good or bad faith intention, withholding of that evidence potentially violates due process. *Id.* at 87. The Supreme Court further crafted a "materiality standard" for courts to apply in analyzing claims of allegedly withheld exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667 (1985). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. To determine the amount of potential prejudice that the withheld evidence caused during trial, courts in Virginia assess the reasonable probability of a different trial result, taking into account the difficulties of trying to envision how the defense would have proceeded at trial had the evidence been disclosed. *See Robinson v. Commonwealth*, 231 Va. 142, 152 (1986).

Petitioner claims that the exculpatory evidence the Commonwealth allegedly withheld at trial and during discovery would have created reasonable doubt with respect to the identity of the assailant. Petitioner's burden is to

demonstrate that, in light of the entire record, the omitted evidence would have provided the jury with a basis for reasonable doubt as to his guilt. *See Soering v. Deeds*, 255 Va. 457, 464 (1998). "Evidence proffered by an accused that merely suggests a third party *may* have committed the crime charged is inadmissible; only when proffered evidence tends *clearly* to point to some other person as the guilty party will such proof be admitted." *Id.* (citing *Karnes v. Commonwealth*, 125 Va. 758, 766 (1919) (emphasis included).

The record reveals that defense counsel targeted another man named "Sirena," whose real name is Julio Cesar Osorto, as the true assailant, but failed to produce any probative evidence of this man's existence. Petitioner asserts that the Commonwealth possessed a photograph and videotape of Osorto. The videotape allegedly shows Orsorto confessing to the crime following his flight to Honduras, thus linking him, at least, to the scene of the crime. The record is unclear as to if and when the Commonwealth possessed the alleged photograph and videotape.

Petitioner's claim that the Commonwealth withheld the photo and videotape may have merit if the Commonwealth had the items in its possession and failed to disclose the evidence before or during trial. Respondent's assertion that the *Brady* standard does not apply if the evidence in dispute was available to defendant from other sources fails in this instance if Petitioner lacked knowledge of its existence at the time of trial. *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852 (1986)). In that case, Petitioner would not have had such a claim available during trial or his series of appeals that followed.

The record appears to support Petitioner's claim that he had no knowledge of the pictures or videotape at trial, thus making them unavailable through any means other than

disclosure by the Commonwealth. Assuming, *arguendo*, that the Commonwealth did have such evidence at the time of trial, a colorable argument exists that both the *Brady* and *Bagley* standards may be satisfied and that there is a serious question as to reasonable doubt under *Soering*. Therefore, it is the Court's opinion that an evidentiary hearing is necessary to determine whether the Commonwealth possessed the photo and videotape, and whether such possession was at a time in which disclosure would have been beneficial to Petitioner.

While Petitioner's first claim concerning exculpatory evidence warrants further examination, his remaining claims of prosecutorial misconduct must be dismissed. In his petition, Petitioner makes numerous claims that the Commonwealth improperly coached witnesses; threatened witnesses with deportation and prosecution; tampered with the jury; failed to inform Petitioner of his Vienna Convention rights; and wrongly promoted the unsubstantiated claim that Petitioner was a "gang" member in order to inflame the jury. Despite the breadth and details of these claims, they are all procedurally barred by the *Slayton* and *Hawks* holdings. Because these claims were available to Petitioner during trial and through the appellate process, the Court does not reach the merits of those claims in the instant proceeding.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next challenges the effectiveness of the assistance of his trial counsel. His allegations consist of the following:

(1) His attorney failed to produce exculpatory witnesses;

(2) His attorney failed to timely object to certain testimony offered by the Commonwealth;

(3) His attorney failed to object to the Commonwealth's continued references to Petitioner's gang affiliation;

(4) His attorney failed to inform him of his Vienna Convention rights to meet with the Honduran Consulate; and

(5) His attorney's relationship with a police officer assigned to the case presented a conflict of interest.

V. LEGAL ANALYSIS

The standard two-prong analysis for analyzing inadequate assistance of counsel claims in habeas corpus petitions was set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a Petitioner must show that trial counsel made errors so egregious as to implicate Petitioner's fundamental Sixth Amendment rights. Secondly, Petitioner must show that counsel's errors prejudiced the defense so seriously that counsel's performance compromised Petitioner's right to a fair trial. *Strickland*, 466 U.S. at 687; *Curo v. Becker*, 254 Va. 486 (1997). Petitioners must overcome high hurdles in challenging trial counsel's trial tactics because great deference is given to counsel's judgment and decisions. *Strickland*, 466 U.S. at 690. Attorneys are presumed to have made decisions and acted with reasonable professional judgment. *Id.* at 690-91.

In a collateral attack on a conviction, "a prisoner not only has the burden of proving ineffective assistance of counsel, but also must prove actual prejudice as a result." *Stokes v. Warden*, 226 Va. 111, 118 (1983); *accord Strickland*, 466 U.S. at 687. In order to establish prejudice, there must be a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside

the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

In applying the *Strickland* test, a Petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In determining the existence of prejudice, the court must consider the totality of the evidence presented at the criminal trial. *Id.* at 695; *accord Strickler v. Murray*, 249 Va. 120, 128, *cert. denied*, 516 U.S. 850 (1995).

It is obvious that trial counsel in the immediate case maintained a consistent, yet unsuccessful strategy. However, "effective" representation is not synonymous with "successful" representation. *See Peyton v. Ellsyon*, 207 Va. 423, 426-27 (1966). The question is whether trial counsel's failure to produce certain witnesses, note timely objections, counter evidence of gang affiliation, or raise the alleged conflict effectively denied Petitioner his constitutional right to assistance of counsel. A review of the record in its entirety revealed that trial counsel's presentation of Petitioner's case did not fall below the acceptable level of representation of a defendant. Moreover, the evidence presented by the Commonwealth demonstrated a convincing case of Petitioner's guilt.

A. Exculpatory Witnesses

Petitioner contends that his trial counsel failed to adduce testimony from witnesses, perceived to be exculpatory, that in Petitioner's view would have changed the trial's outcome. Counsel is not ineffective for failing to call an unfavorable witness that may weaken, rather than strengthen, a defense. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

The record indicates that trial counsel did not call certain witnesses because Petitioner's father instructed him not to,

or the witnesses had provided false statements to police. "[W]hen defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. It appears that counsel's trial strategy was to exclude the witnesses in question because in his opinion they would weaken the defense. Petitioner cannot prove prejudice if counsel declined to call a witness whose credibility was subject to impeachment. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

B. Objections

Petitioner further argues that counsel was ineffective for failing to object to portions of the Commonwealth's evidence. Specifically, Petitioner claims that trial counsel should have objected to the medical examiner's testimony about cause of death. However, the record indicates that trial counsel maintained a consistent strategy not to object to testimony that would make it appear he was trying to hide something from the jury. Such reasonable, strategic choices are "virtually unchallengeable". *Strickland*, 466 U.S. at 690. Moreover, it is unlikely that counsel's objection to the medical examiner's opinion would have been sustained.

C. "Gang Taint"

Petitioner argues that trial counsel failed to disassociate Petitioner from the taint of gang affiliation and that his questions tended to promote the association. The record reflects that counsel's strategy in navigating the gang overtones in the case was to promote the victim's gang relationship. Petitioner cannot now question this tactic in hindsight, for courts have been reluctant to second-guess trial lawyers' tactics. *See Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977). The *Strickland* test requires the reasonable probability that counsel's errors caused an

unreliable trial outcome. *See Strickland*, 466 U.S. at 687. The Petitioner has not proven such probability.

D. Vienna Convention Rights

Petitioner further assails his trial counsel for not advising him of his right to meet with the Honduran consul under the Vienna Convention on Consular Relations. Assuming, without deciding, that such rights exist under the facts of this case, the Court's holding in *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975) bars this claim because Petitioner had ample time to raise the issue at trial or on appeal.

E. Conflict of Interest

Lastly, Petitioner claims trial counsel allowed a conflict of interest to compromise his representation of Petitioner in violation of Petitioner's Sixth Amendment rights. Petitioner claims that one of the police officers in the case had previously recommended trial counsel's legal services to other members of the community. Petitioner, though, fails to show the alleged conflict of interest actually had an adverse effect on counsel's performance, particularly because the record reflects that counsel had no knowledge of the referrals. *See Mickens v. Taylor*, 122 S. Ct. 1237, 1243-44 (2002) (holding that a defendant must establish that an alleged conflict of interest adversely affected his counsel's trial performance to demonstrate a Sixth Amendment violation).

VI. CONCLUSION

In the final analysis, the Court is of the opinion that only one of Petitioner's claims warrants further review. The record is unclear whether the photograph or videotape of Osorto's statement was in the Commonwealth's possession in time to be of value to Petitioner at his trial or for an immediate post-trial proceeding.

If the photograph or video were available, the Court must further determine whether it was in fact exculpatory.

These issues will require a limited evidentiary hearing. Therefore, Petitioner's Petition with respect to this issue is granted.

The remaining prosecutorial misconduct and ineffective assistance of counsel claims are barred by Virginia habeas corpus law. Accordingly, the Court grants Respondent's Motion to Dismiss with respect to those remaining claims.

Entered this 8 day of August 2002.

/s/

Henry E. Hudson, Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner's Application for a Writ of Habeas Corpus. The Court finds that a limited evidentiary hearing is required with respect to whether certain evidence was in the possession of the Commonwealth, and if so, whether that evidence was exculpatory to Petitioner. It is therefore

ORDERED that the Petition is GRANTED only on the issues of determining whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It is further

ORDERED that the Petition with respect to all remaining issues is DENIED.

Entered this 8 day of August, 2002.

/s/
Henry E. Hudson, Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER AMENDING MEMORANDUM OPINION

After consideration of the Respondent's Motion for Clarification, the Petitioner's response, and argument by the parties, the Court finds that, for the reasons stated to the record, the Motion has merit.

WHEREFORE, it is hereby ORDERED that paragraph V(D) of this Court's Memorandum opinion of August 8, 2002, be and hereby is modified to read as follows:

"D. Vienna Convention Rights

Petitioner further assails his trial counsel for not advising him of his right to meet with the Honduran consul under the Vienna Convention on Consular Relations. Assuming, without deciding, that such rights exist under the facts of this case, this belated claim is barred by the statute of limitations, Code § 8.01-654 (A)(2), and in any event is without merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984)."

This Court notes the petitioner's exception to this action.

The Clerk is directed to forward a certified copy of this order to John C. Kiyonaga, counsel for the petitioner, and to the respondent, H. Elizabeth Shaffer, Assistant Attorney General.

Enter this 3 day of October, 2002.

/s/ Terrence Ney
Judge

I ask for this:

/s/
H. Elizabeth Shaffer, Esq.
Assistant Attorney General
900 East Main Street
Richmond, VA 23219
Counsel for Respondent

Seen:

/s/
John C. Kiyonago, Esq.
526 King Street
Suite 213
Alexandria, Virginia 22314
Counsel for Petition

FAIRFAX COUNTY POLICE DEPARTMENT
SUPPLEMENTARY INVESTIGATION REPORT

Date of Event: 12/10/97
Time of Event: 2025
Case: 97344-001799
Nature: Malicious wounding

COMP
Name: Merry, James
Address: 8064 Tributary Ct., Springfield, VA
Phone Pers: 569-2158
Phone Bus: None
Age: 18 **Race:** W **Sex:** M
Date of Birth: 6/29/79

VICTIM/WITNESS
[BLANK]

ARRESTED/SUSPECT/OTHER
Name: Osorto, Julio C.
Address: 5736 Backlick Rd., #103, Spfld, Va.
Age: 21 **Race:** H **Sex:** M
Date of Birth: 11/25/76
HT: 55-58 **WT:** 160-180
Hair Color: Blk **Eye Color:** Brn
Hair Style: curly on top **Hair Length:** short
Clothing Description: Blk Leather Jacket, Blue Jeans
SSAN: 026200096465

REMARKS

While canvassing the area reference a Malicious Wounding at Springfield Plaza PFC MacCaskill and myself stopped the above listed subject walking down Dinwiddie St. Mr. Osorto had what appeared to be ketchup on his pant legs and a little on his shirt. He claimed he had come

from McDonalds where he had eaten a cheeseburger. Mr. Osorto originally stated he was coming from his cousins residence on Cumberland Ave., then he stated he was coming from Commerce St.

Mr. Osorto stated he was not at Popeyes and he had a slight odor of alcohol upon his breath. He stated he lived at Chelsey Square Apts. but was confused on the address.

Mr. Osorto was identified and NCIC/VCIN checks were negative. Mr. Osorto was issued a Suspension / Revocation form and sent on his way.

TOT-CIB.

The property, the two baseball bats, were handed over to Gary Allen at 0015 hrs.

Date of Report: 12/10/97
Time of Report: 2200
Investigated by: C.J. Mahoney
EIN: 2551

Time Received: 2025
Time Arrived: 2035
Time Cleared: 2130
Approving Supervisor: /s/
EIN: 1145
Date: 12/10/97

Case Status: 6 Active-TOT CIB

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

FINAL ORDER

THIS CAUSE is before this Court on Petitioner's Application for a Writ of Habeas Corpus. Upon consideration of that petition, the motion to dismiss filed by the respondent and the authorities cited therein, the Court, by memorandum opinion and order dated August 8, 2002, ordered an evidentiary hearing limited to the question whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It granted respondent's motion to dismiss all remaining claims.

After mature consideration of the foregoing and of the evidence presented at the evidentiary hearing on December 5, 2002, and a review of the record in the criminal case of *Commonwealth v. Mario Bustillo*, Case No. CR-93337, which is hereby made a part of the record in this habeas corpus matter, the Court finds for the reasons stated to the record at the evidentiary hearing that the petitioner is not entitled to the relief sought. The Court concludes that the Commonwealth did not violate the

petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and grants respondent's motion to strike the evidence.

This Court incorporates by reference the August 8, 2002 memorandum opinion and order and its order of October 3, 2002 amending the memorandum opinion.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to petitioner, John C. Kiyonaga, Esq., the respondent, and H. Elizabeth Shaffer, Assistant Attorney General, and Stephen R. McCullough, Assistant Attorney General.

Entered this 21 day of February, 2003.

/s/

R. Terrence Ney, Judge

CIRCUIT COURT OF FAIRFAX COUNTY

MARIO A. BUSTILLO

v.

GENE M. JOHNSON AND
RONALD J. ANGELONE

September 16, 2003

Case No. (Law) 201879

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* * * * *

BY JUDGE R. TERRENCE NEY

This matter came before the Court pursuant to the Petitioner's Motion to Reconsider the Court's Order of February 21, 2003, whereby the Court denied the Petition for Habeas Corpus Relief.

Facts

On December 10, 1997 John Merry was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Petitioner Mario Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998, Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied by

the Court of Appeals of Virginia on April 11, 2000. Bustillo next appealed to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court denied Bustillo's writ of certiorari on June 4, 2001.

Bustillo subsequently filed a Petition for a Writ of Habeas Corpus in the Fairfax Circuit Court claiming, among other things, that the Commonwealth had engaged in several acts of prosecutorial misconduct.[1] Specifically, Bustillo alleged that the Commonwealth:

1. Failed to disclose exculpatory evidence;

2. Engaged in improper and suggestive witness coaching;

3. Threatened and intimidated witnesses in exchange for incriminating testimony;

4. Failed to inform Petitioner of his Vienna Convention rights;

5. Had improper contact with a member of the jury; and

6. Prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required with respect to whether certain evidence, namely a videotape and photograph of an individual named "Sirena" who the defense claimed was responsible for the crime, was in the possession of the Commonwealth and, if so, whether such evidence was exculpatory in nature.[3]

An evidentiary hearing on the issues of the videotape and photograph was set for December 5, 2002. Prior to the

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[1] Petitioner also raised the claim of ineffectiveness of counsel.

[2] The Honorable Henry E. Hudson presided over the August 8, 2002, evidentiary hearing.

[3] The Petition with respect to all other issues raised was denied.

hearing, this Court granted various discovery requests[4] made by the Petitioner, including:

1. The production of the photograph of "Sirena" by the Commonwealth, if found;

2. The identity of any official of the Fairfax County Police Department, the investigative, or prosecution team who possessed it;

3. Any information possessed by the Fairfax Police Department pertaining to "Sirena," a.k.a. Julio Cesar Osorto Herrera; and

4. The investigative notes of Fairfax County Police Detective Richard J. Cline.

Pursuant to these discovery orders,[5] the Commonwealth produced to counsel for Bustillo a photograph of "Sirena," a copy of Detective Cline's notes of an interview with witness Jose Armando Amaya ("Amaya") dated January 7, 1998,[6] and a copy of Fairfax County Police Officer C. J. Mahoney's investigative report dated December 10, 1997, documenting his stop of an individual named Julio Osorto.[7] None of these

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[4] See this Court's Orders dated October 2, 2002, and November 15, 2002.

[5] *Id.*

[6] The notes of Detective Cline contain scattered references to "Sirena" as a person present at the scene. According to Detective Cline's notes dated January 7, 1998, Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. # 3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997, contain the following notation: "Sirena Julio" as being one of the persons present at the scene.

[7] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant.

items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, the Court heard evidence regarding the videotape and photograph of "Sirena," and, in particular, when the Commonwealth obtained such evidence. Finding that neither the videotape nor the photograph were obtained by the Commonwealth during the investigation or prosecution, but rather were obtained post-trial,[8] and, as a result, the Commonwealth had no obligation under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), to turn over the videotape or the photograph to the defense, the Court denied the Petition for a Writ of Habeas Corpus. After hearing evidence, the Court took the matter under advisement. The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on the evidence furnished to the Petitioner by virtue of the discovery orders, in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

On March 13, 2003, the Court issued a Suspending Order tolling the running of the twenty-one day period in order to conduct a further review of the matter.

Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[8] In a sworn affidavit dated April 29, 2002, Officer Abraham Gelabert testified that he "found the photograph [of Sirena] after trial." In addition, the evidence before the Court demonstrated that the videotape was initially procured by Petitioner's counsel and was subsequently furnished to the Commonwealth on March 5, 1999, almost one year *after* the trial.

Analysis

The issue before the Court is two-fold, namely whether Detective Cline's notes and/or Officer Mahoney's Report constitute exculpatory evidence, and if so, whether the disclosure of such evidence to the defense would have resulted in a different outcome at trial.

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

Evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Id.*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6, 133 L. Ed. 2d 1, 116 S. Ct. 7 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919).

A petitioner has the burden of showing that, when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's guilt. *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v. Commonwealth*, 232

Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990). Thus, in order for Bustillo to be granted habeas corpus relief, this Court must find that (1) the Mahoney Report and/or Detective Cline's notes constitute exculpatory evidence and (2) the exculpatory evidence is material.

Exculpatory Nature of the Mahoney Report and Detective Cline's Notes

Under *Brady*, exculpatory evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Bagley*, 473 U.S. at 676.

Bustillo argues that prior to the 1998 trial, the Commonwealth's Attorney was well aware of the defense's theory that someone other than Bustillo, namely "Sirena," a.k.a. Julio, had committed the murder of John Merry. Indeed, that was the thrust of the defense case. Bustillo further alleges that not only was the Commonwealth fully aware that "Sirena" also went by the name of "Julio,"[9] but that the Commonwealth was also made aware that "Sirena" and Julio *Osorto* were one and the same person through Officer Mahoney's Report and Detective Cline's interview notes.[10] In addition, the Commonwealth was certainly

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[9] In a letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney Todd Sanders disclosed that "Sirena" was also known as "Julio," but did not further identify the latter.

[10] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived in Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998, state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002, hearing, the Commonwealth argued that it made no connection between the two men and did not know that "Sirena," a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

aware that Merry's blood was found at the scene where he had been assaulted.

Hence, Bustillo argues that Detective Cline's notes, in particular the note equating Julio and Sirena,[11] the note indicating that Sirena held a "cocked" bat,[12] and the note documenting the Chelsea Square Apartment address,[13] and Officer Mahoney's Report, which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission, must be deemed exculpatory. Notwithstanding the Commonwealth's alleged inability to equate "Sirena" with Julio Osorto prior to trial, the Petitioner asserts that the contents of the Mahoney Report and Detective Cline's notes, standing alone, are exculpatory, thereby requiring their disclosure prior to trial.

1. *Julio Osorto – Sirena*

Although not the prime focus of the December 5, 2002 evidentiary hearing, the testimony suggested that the police may not have known prior to trial that "Sirena," the individual referenced by Amaya during his interview with Detective Cline and later identified by others as the assailant,[14] and Julio Osorto, the individual stopped by Officer Mahoney near the crime scene the night Merry was assaulted, were one and the same person. Nor would any reasonable police officer necessarily have made the connection with the

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[11] See Detective Cline's notes of an interview with Nicholas Parada dated December 18, 1998.

[12] See Detective Cline's notes of his interview with Amaya dated January 7, 1998.

[13] See note 9, *supra*.

[14] At the post-trial hearing for a new trial held on July 13, 1998, several witnesses came forward and testified that "Sirena" was the assailant. See Testimony of Giovany Hernandez, Tr. 07/13/98, p. 20; Testimony of Marvin Escobar, Tr. 07/13/98, pp. 40-43; Testimony of Jose Maldonaldo, Tr. 07/13/98, pp. 56, 57.

facts available to them at the time.[15] Although Amaya referenced an individual named "Julio" during his interview with Detective Cline,[16] nowhere in Detective Cline's notes is "Julio" identified as "Julio Osorto."[17] As such, the Commonwealth testified that it had no reason to suspect or believe prior to trial that either the Mahoney report or those portions of Detective Cline's notes referencing "Julio," standing alone, were exculpatory in nature. The Commonwealth is charged with knowledge of what was contained in *both* reports. *Fitzgerald v. Bass*, 6 Va. App. 38, 50, 366 S.E.2d 615, 622 (1988) (constructive knowledge is attributed to the prosecutor where the information is in possession of the police) (citations omitted).

Turning to the specific evidence, the Commonwealth was certainly aware that Detective Cline conducted several pretrial interviews with various eyewitnesses, as the Commonwealth had Detective Cline testify at trial regarding his interviews with witnesses who had identified Bustillo as the assailant. The Commonwealth was also aware of Detective Cline's pretrial interview with Amaya, as the Assistant

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[15] As the evidence presented at the December 5, 2002, hearing demonstrated, the police did not even have in their possession a photo of "Sirena" until months after the trial. After-discovered evidence does not constitute a basis for habeas relief. *Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (1988).

[16] See *supra*.

[17] Petitioner's contention that reference to the Chelsea Square Apartments in both the Mahoney Report and Detective Cline's notes serve to put the Commonwealth on notice that "Sirena" and Julio Osorto were one and the same person, thus rendering the Mahoney Report and Detective Cline's notes exculpatory, is not dispositive. Two persons listing the same address as their place of residence does not necessarily dictate that such persons are one and the same. Certainly more than one person may occupy a particular residence at the same time.

Commonwealth Attorney summarized the contents of that interview in a letter sent to defense counsel prior to trial.

Similarly, the Commonwealth knew, or is charged with knowing, of the existence of the Mahoney report prior to trial. Yet the Commonwealth offered no explanation as to why Detective Cline's notes or the Mahoney Report were not produced to defense counsel other than the argument that the information contained within Detective Cline's notes and the Mahoney Report was not exculpatory.

The Commonwealth should have known, given the contents of the investigative notes and the police report, that "Sirena-Julio" and Julio Osorto might be one and the same person. Both the Mahoney Report and Detective Cline's notes unquestionably implicate "Sirena," a.k.a. Julio, and "Julio" Osorto, as a possible suspect. The Commonwealth should have made the connection, especially given the defense's insistence that "Sirena"/"Julio" was the assailant.

Moreover, although the Commonwealth disclosed to the defense prior to trial that Sirena was observed at the scene the night Merry was assaulted and that "Sirena's first name appears to be Julio,"[18] it failed to disclose that Amaya also told Detective Cline that he observed Sirena holding a bat in a "cocked" position. This latter piece of information not only makes clear that Sirena was present at the scene, but also implicates Sirena as the actual assailant.

As such, evidence that "Sirena-Julio" was observed approaching the victim and holding a bat in a "cocked" position and evidence that an individual named Julio Osorto was stopped by an officer on the night of the assault near

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[18] In his letter to defense counsel dated March 9, 1998, Sanders informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats."

the crime scene with red stains on his clothing must be deemed exculpatory.

2. *Stop of Julio Osorto*

With respect to the "ketchup stains" observed on Julio Osorto's clothing and referenced in the Mahoney Report, the evidence presented at trial was unclear as to a finding of blood *spatter* at the time Merry was struck. The Commonwealth's uncontradicted expert testimony at trial demonstrated that the fatal blow to the victim's head resulted in a closed head wound.[19] Yet the evidence also showed that there was blood at the scene,[20] including photographic evidence of what appeared to be blood spatter.

Given all of the evidence presented at trial concerning the nature of the victim's injury, which admittedly includes the absence of blood on the victim, the absence of blood on the bats, and the absence of blood on Bustillo, but yet with photographs of the crime scene depicting what appears to be blood spatter, and testimony identifying "Sirena-Julio" as the assailant, the Court finds that the information contained within Mahoney's Report, namely the stopping of a "Julio" near the crime scene at the time of the incident with red stains on his clothes, is exculpatory in nature warranting its production to the defense prior to trial.

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[19] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98, p. 131 (Michelle Gutierrez); Tr. 3/18/98, p. 222 (Jesse Konstanty); Tr. 3/18/98, p. 264 (Nicholas Parada); Tr. 3/18/98, p. 27 (Valeria Landaeta); Tr. 3/18/98, pp. 100, 111 (Amilcar Amaya); Tr. 3/18/98, p. 142 (Christina Hondoy). In addition, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98, p. 193.

[20] Dr. Frances Field further testified that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear then out of the ear canal. Tr. 3/17/98, p. 193.

Materiality of the Mahoney Report and Detective Cline's Notes

Notwithstanding the exculpatory nature of Detective Cline's notes and the Mahoney Report, a new trial is not automatically required whenever [ ] "a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States*, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S. Ct. 763 (1972). In other words, the Petitioner still must establish the materiality of such evidence.

As previously stated, implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. *Bagley*, 473 U.S. at 676. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528, citing *United States v. Agurs*, 427 U.S. at 109-10. Rather, evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed, the result of the trial would have been different. *Id.*, 255 Va. at 464, 499 S.E. at 519, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In further defining the materiality standard, the *Strickland* Court explained that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. In determining whether Bustillo has established a "reasonable probability" that disclosure of Detective Cline's notes

and/or the Mahoney Report to the jury would have [a]ffected the outcome of the trial, the Court considers the exculpatory evidence in context with the existing record.

First, although there is no manifest connection between the "Julio" stopped by Officer Mahoney and the assault of John Merry, Bustillo has shown that Julio Osorto was present in the general vicinity of where the crime occurred, near the time of the assault, with what appeared to be "ketchup stains" on his shirt and pants. Additionally, both Officer Mahoney's notes and Detective Cline's notes reference the Chelsea Square Apartments with respect to "Julio's" reported residence.

Second, in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a "Sirena," the jury would still have to disregard the substantial evidence presented at Bustillo's criminal trial that Bustillo was the assailant.

For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrrez testified that both "Sirena" and Bustillo were present at the crime scene[21] and that Bustillo was the one who took a bat and struck the victim.[22] Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant.[23]

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[21] Testimony of Michele Gutierrez, Tr. 03/17/1998, p. 129.

[22] *Id.*, Tr. 03/17/98, p. 131.

[23] Testimony of Jesse Konstanty, Tr. 3/17/98, p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98, p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98, p. 36.

In addition, Detective Cline testified about his pre-trial interview with Nicholas Parada ("Parada"),[24] who was present at the scene the night of the assault. Parada told Detective Cline that he observed "[Bustillo] standing there with a bat and the victim had fallen to the ground."[25] Detective Cline further testified that when he interviewed Parada on December 18, 1997, Parada told him that he actually saw Bustillo "swinging the bat . . . he saw the bat swinging and he saw the person drop to the floor or to the ground. But [Parada] did indicate that he didn't actually see him strike the victim [although] he did see him swinging the bat in that direction." Testimony of Detective Cline, Tr. 03/18/98, p. 52. Detective Cline also stated that among all the people he interviewed at the crime scene the evening of the assault, "Mario" was the only one everybody identified as having swung the bat. Tr. 03/18/98, p. 53.

Petitioner points out that Nicholas Parada testified at trial that, although he did not see the assault, he did see Bustillo swing the bat in the direction of the victim. Tr. 03/17/98, p. 271. Petitioner contends that this observation recounts precisely the same act as that reported by Amaya in his interview with Detective Cline on January 7, 1998, which Amaya attributed to Sirena.

The jury, however, also heard testimony during the trial implicating "Sirena" as the assailant. Testifying for the defense, Amilcar Amaya[26] stated that he was outside the Popeye's when he saw "Senior Julio"[27] *also known as*

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[24] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[25] Testimony of Detective Cline, Tr. 03/18/98, p. 51.

[26] Amilcar Amaya is not the same person as Jose Armando Amaya referred to in Detective Cline's notes dated January 7, 1998.

[27] Amilcar Amaya indicated that he did not know "Julio's" last name.

"*Sirena*" take a bat and strike the victim.[28] Esmirna Hondoy also testified that she was at Popeye's and witnessed the assault. Although she could not identify the assailant, she testified that Bustillo was *not* the one who attacked the victim.[29]

The jury, having heard evidence in support of both theories, that the assailant was either Bustillo or Sirena/Senior Julio, believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury. *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

Notwithstanding, the Court, in addressing the materiality issue on habeas review, must consider what defense counsel could have done or might have done differently had Detective Cline's notes and/or the Mahoney Report been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury. *Evans-Smith v. Taylor*, 30 Va. Cir. 116 (Loudoun County, 1993).

With respect to the first aspect, it is reasonable to assume that, had the defense known about Amaya's statement

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[28] Testimony of Amilcar Amaya, Tr. 03/18/98, p. 99, 100-01, 110-11.

[29] Testimony of Esmirna Hondoy, Tr. 03/18/98, p. 142-43. Officer Bayliss, who was also called to testify for the defendant and was the first officer to arrive at the Popeye's the night of the crime, stated that when he spoke with Hondoy that night, she told him that the assailant was "Mario" and that Mario took the bat from another individual named Lisandro Parada. Testimony of Officer Bayliss, Tr. 03/18/98, p. 185. Detective Cline gave similar testimony in rebuttal. Testimony of Detective Cline, Tr. 03/18/98, p. 189.

to Detective Cline regarding his observation of Sirena's holding a "cocked bat" and the police stop of Julio Osorto on the night of the assault, then the defense would have sought to have had Amaya, Officer Mahoney, and Julio Osorto testify on its behalf. Alternatively, in the event that such witnesses were unavailable to testify, defense counsel may have sought to have had Detective Cline's notes and/or the Mahoney Report introduced into evidence at trial to further support the defense theory that Julio/Sirena, not Bustillo, was the actual assailant. The Court does not opine on the admissibility of either Detective Cline's notes or the Mahoney Report and in particular whether such reports, if deemed hearsay, would fall under any of the exceptions to the hearsay rule.

Furthermore, with respect to the "ketchup stains" referenced in the Mahoney Report, the trial record is devoid of evidence that the victim suffered an open-head wound or testimony as to blood spatter, save the photographic evidence of what appeared to be blood at the scene. But Officer Mahoney's observations of "what appeared to ketchup on [Julio Osorto's] pant legs and a little on his shirt," when coupled with the photographs, tend to belie the evidence presented in support of the Commonwealth's closed head wound theory. With the Mahoney Report in hand, the defense might have further developed its theory of the case, namely, that the victim suffered an open head wound at the moment of impact and that the wound resulted in the transfer of the victim's blood to the assailant.

Third, the Court has to consider the effect that Detective Cline's notes, in particular Amaya's statement, and the Mahoney Report would have had on the result of the trial had such evidence been presented to the jury. While certainly arguable either way, additional corroborating witnesses for the defense might have bolstered its theory

that Sirena was the actual assailant.[30] In addition, evidence of what may have been blood on Julio Osorto might have cast doubt not only on the Commonwealth's closed head wound theory, but also on Bustillo's guilt.

Conclusion

Upon review of the entire record and a full consideration of the issues, the Court finds that the information contained within Officer Mahoney's Report and the information contained within Detective Cline's notes, documenting Julio Osorto/Sirena's presence and actions at the crime scene, are exculpatory and thus should have been disclosed to the defense prior to trial.

As to whether the notes of Detective Cline and Officer Mahoney show a reasonable probability that, had such evidence been disclosed to the defense, the result of the criminal trial might have been different, the Court is unwilling at this time to set aside the verdict and order a new trial absent further evidence as to such a probability. In order to properly determine whether disclosure of the police investigative notes and report to the jury would have affected the outcome of trial, the Court finds that a limited hearing on the issue of materiality is warranted in determining whether Bustillo has established that he is entitled to habeas relief.

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[30] As the Petitioner points out, Amaya's testimony certainly would not have been cumulative, as there was only one other defense witness (Amilcar Amaya) to inculpate Sirena as the assailant. In addition, the Commonwealth referred more than once in closing argument to the fact that the defense produced only one eyewitness to name the assailant in comparison to the several witnesses identifying Bustillo as the assailant. The Petitioner argues that Amilcar Amaya's testimony was ultimately rejected by the jury because of the lack of any corroborating witnesses.

The Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending further proceedings.

Order

This matter came before the Court pursuant to Petitioner's Motion for Reconsideration of this Court's February 21, 2003, Order, whereby the Court denied the Petition for a Writ of Habeas Corpus subsequent to a limited evidentiary hearing held on December 5, 2002. On March 13, 2003, the Court entered a Suspending Order tolling the running of the twenty-one day period to conduct a further review of the matter. For the reasons stated in this Court's opinion letter dated September 16, 2003, which is attached hereto and made a part hereof, the Petitioner's Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending a limited evidentiary hearing on the issue of materiality.

[Judicial Seal Omitted]

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 4, 2004

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Re: *Mario Bustillo v. Gene M. Johnson*, at Law
No. 201879

Dear Counsel:

Pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief, this matter came before the Court on April 7, 2004 for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence

the Commonwealth of Virginia failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

FACTS

On December 10, 1997 James Merry ("Merry") was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998 Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

After exhausting all of his appeals, Bustillo filed a Petition for a Writ of Habeas Corpus asserting, among other things, that the Commonwealth failed to disclose exculpatory evidence.[1]

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required to determine whether the Commonwealth possessed at the time of trial a photograph and videotaped confession of "Sirena," an individual who the defense said was responsible for the crime, and, if so, whether such evidence was exculpatory in nature.[3]

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[1] In his Petition for Habeas Relief, Bustillo also alleged that the Commonwealth engaged in improper and suggestive witness coaching; threatened and intimidated witnesses in exchange for incriminating testimony; failed to inform Petitioner of his Vienna Convention rights; had improper contact with a member of the jury; and prejudicially promoted Petitioner's alleged "gang" affiliation at trial. In addition, Bustillo claimed ineffectiveness of counsel.

[2] On August 8, 2002 the Honorable Henry E. Hudson issued a Memorandum Opinion and Order.

[3] The Petition with respect to all other issues raised was denied.

The evidentiary hearing was set for December 5, 2002. Prior to the hearing, this Court granted various discovery requests[4] made by Bustillo. Pursuant to the discovery orders,[5] the Commonwealth produced a photograph of "Sirena", a copy of Detective Cline's notes of an interview with one Jose Armando Amaya ("Amaya") dated January 7, 1998,[6] and a copy of Fairfax County Police Officer C.J. Mahoney's ("Mahoney") investigative report dated December 10, 1997 documenting his stop of an individual named Julio Osorto.[7] None of these items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, after finding no evidence that the Commonwealth possessed either a photograph or videotaped confession of Sirena at the time of trial, the Court denied the Petition for a Writ of Habeas Corpus.[8]

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[4] See this Court's Orders dated October 2, 2002 and November 15, 2002.

[5] *Id.*

[6] According to Detective Cline's notes dated January 7, 1998 Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. #3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997 contain the following notation: "Sirena – Julio" as being one of the persons present at the scene.

[7] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant. Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[8] The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on evidence furnished by virtue of the Court's 2002 discovery orders,[9] in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

On September 16, 2003 the Court granted Bustillo's Motion to Reconsider, finding that the information contained in Detective Cline's notes—in particular the note equating Julio and Sirena,[10] the note indicating that Sirena held a "cock[ed]" bat,[11] and the note documenting the Chelsea Square Apartment address,[12]—and the information contained in Officer Mahoney's Report—which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission—were exculpatory in nature and therefore should have been disclosed to the defense prior to trial.

With respect to the issue of materiality, the Court declined to set aside the verdict and order a new trial absent further evidence as to the probability that, had the evidence been disclosed to the defense, the result of the criminal trial might have been different.

A limited hearing on the issue of materiality was held on April 7, 2004.

ANALYSIS

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irre-

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[9] See note 4, *supra*.

[10] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[11] See Detective Cline's notes of his interview with Jose Armando Amaya dated January 7, 1998.

[12] *Id.* See also note 39, *infra*.

spective of the good faith or bad faith of the prosecution.[13] Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[14]

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome."[15] Thus, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[16] Rather, a petitioner has the burden of showing that when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's guilt.[17]

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[13] *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[14] *Id.*, citing *United States v. Bagley*, 473 U.S. 667 (1985). In addition, evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Soering*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919). Only when the proffered evidence tends to clearly point to some other person as the guilty party will such proof be admitted. *Id.*

[15] *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668 (1984). In further defining the materiality standard, the *Strickland* Court explained that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695.

[16] *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528, citing *United States v. Agurs*, 427 U.S. at 109-110.

[17] *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v. Com-*

In addition, the Court—in addressing the materiality of exculpatory evidence on habeas review—may consider what defense counsel could have done or might have done differently had the evidence been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury.[18]

In support of the materiality of Detective Cline's notes and the Mahoney Report, Bustillo called four witnesses to testify about the presence of Sirena and/or blood spatter at the crime scene, matters which purportedly would have been further explored at trial and might have led to a different outcome had the Commonwealth disclosed the evidence to the defense.

Dr. Peter Bernad

Dr. Peter Bernad ("Dr. Bernad"), a licensed neurologist who reviewed Merry's autopsy report and treatment records in preparation for the April 7, 2004 hearing,[19] described Merry's injuries as severe blunt trauma to the left side of the head, multiple fractures, and destruction of bone and blood vessels.[20]

Dr. Bernad further testified that the blow to Merry's head likely resulted in a ruptured eardrum, thus allowing blood to "seep" out of the left ear canal.[21] With respect to time involved, Dr. Bernad explained that the blood would have had "significant velocity" to push through the tym-

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monwealth, 232 Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990).

[18] *William Evans-Smith v. John B. Taylor*, 30 Va. Cir. 116 (Loudoun County Circuit Court, 1993).

[19] Dr. Frances Field, not Dr. Bernad, was the medical examiner who performed the autopsy of Merry in 1998.

[20] See testimony of Dr. Peter Bernad, April 7, 2004.

[21] *Id.*

panic membrane and exit the ear, and that given the injury sustained, bleeding would have occurred "almost immediately" after impact.[22]

On cross-examination, however, Dr. Bernad testified that he was not an expert on blood spatter.[23] In addition, he conceded that while blood may have aerated from the ear immediately upon impact, it was also possible that given such an injury, it could have taken a couple of seconds for blood to "seep" from the ear.[24] Moreover, Dr. Bernad testified that Merry's injury would not have produced a significant amount of bleeding.[25]

In reviewing Dr. Bernad's testimony in light of the existing record, including the crime scene photos, the prior testimony of the Commonwealth's expert regarding Merry's injuries,[26] and the prior testimony of several eyewitnesses,[27] his testimony fails to give rise to a reasonable doubt with respect to the nature of Merry's injuries and the closed head wound evidence shown by the Commonwealth.

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] At the 1998 trial, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98 p. 193. Dr. Frances Field further testified—consistent with Dr. Bernad's testimony—that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear and then out of the ear canal. Tr. 3/17/98 p. 193.

[27] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98 p. 131 (Michelle Guiterrez; Tr. 3/18/98 p. 222 (Jesse Konstanty); Tr. 3/18/98 p. 264 (Nicholas Parada); Tr. 3/18/98 p. 27 (Valeria Landaeta); Tr. 3/18/98 p. 100, 111 (Amilcar Amaya); Tr. 3/18/98 p. 142 (Christina Hondoy).

Notwithstanding Dr. Bernad's testimony that blood would have "sprayed/aerated" from the victim's ear at some point upon or almost immediately after impact, the crime scene photos revealed no signs of blood "spray," "spatter" or droplets, but rather only a few sizable drops of blood, the latter of which the Court finds consistent with blood seepage, not blood spatter.

Yahayra Quierola

Yahayra Quierola ("Quierola"), purportedly present at the Popeye's Restaurant the night Merry was attacked,[28] testified that upon hearing a "noise," she turned and saw blood on Merry's face and ears.[29] She further testified that her friend "Christina," also present at the scene, had droplets of blood on her shirt after the attack.[30]

On cross-examination, Quierola testified that she saw blood coming from Merry's ears only, in contradiction to a prior statement she made under oath that she saw "blood explode from [Merry's] ears, nose and throat."[31] In addition, Quierola could not recall when or how quickly the blood began to "spurt" from Merry's ears.[32]

The Court does not find Quierola's testimony either persuasive much less dispositive on any issue of materiality with respect to either Detective Cline's notes or the Mahoney Report.

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[28] Quierola did not testify at the 1998 trial. At the post-trial hearing hearing held on July 13, 1998, she identified a photo of Sirena and testified that he "looked like the assailant."

[29] See testimony of Yahayra Quierola, April 7, 2004.

[30] *Id.*

[31] *Id.*

[32] *Id.* Interestingly, only this witness testified to observing blood coming from *both* of Merry's ears.

Amilcar Amaya

Next, Amilcar Amaya ("Amaya") testified that he saw Julio Osorto a/k/a Sirena strike Merry with a baseball bat,[33] and that upon impact, he observed blood spray "in the direction of" and "over" Sirena.[34]

The Court does not find Amaya's testimony credible. First, although Amaya testified that he saw blood spray toward Sirena upon impact—suggesting that it was on Sirena's shirt—Amaya later clearly testified that he did *not* observe any blood on Sirena's shirt.[35]

Second, Amaya's testimony is inconsistent with his prior testimony. Neither at the 1998 trial nor in his post-trial affidavit(s) did Amaya testify about the presence of blood at the moment of impact.[36]

Absent credible testimony regarding the presence of blood on Sirena's shirt, the materiality of Mahoney's Report is wanting. In addition, although Detective Cline's notes—which reference "Sirena"—corroborate Amaya's testimony regarding Sirena's presence at the scene, they also place *Bustillo* at the scene, a fact plainly at odds with his alibi defense. As a result, the Court finds that Bustillo fails to demonstrate a reasonable probability that, but for the Commonwealth's nondisclosure of the notes, the result of the proceeding would have been different.[37]

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[33] See testimony of Amilcar Amaya, April 7, 2004. At the 1998 trial, Amaya testified that he was outside the Popeye's when he saw "Senior Julio" *also known as "Sirena"* take a bat and strike the victim. See testimony of Amilcar Amaya, Tr. 03/18/98 p. 99, 100-101, 110-111.

[34] See testimony of Amilcar Amaya, April 7, 2004.

[35] *Id.*

[36] See note 41, *infra*.

[37] The Court also notes that in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a. "Sirena", the jury would still have to disregard the substantial

David Bernhard

Lastly, David Bernhard ("Bernhard"), Bustillo's defense attorney at trial, was called to testify about possible defense strategies that might have been employed had the Commonwealth produced Detective Cline's notes and the Mahoney Report.

During the 1998 trial, the defense, relying primarily on an alibi defense, also argued that someone other than Bustillo, namely "Sirena", a.k.a. Julio, had struck and killed Merry.

In addressing the materiality of the undisclosed evidence, Bernhard testified that he was "shocked" to learn of the existence of Detective Cline's notes and the Mahoney Report because both tended to corroborate the existence and presence of Sirena at or near the crime scene shortly after the attack.[38] Bernhard further testified that had he possessed the exculpatory documentation at the time of trial, he likely would have called Officer Mahoney to testify

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evidence presented at the 1998 trial that Bustillo was the assailant. For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrez testified that both "Sirena" and Bustillo were present at the crime scene and that Bustillo was the one who took a bat and struck the victim. Testimony of Michele Gutierrez, Tr. 03/17/1998 p. 129-131. Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant. Testimony of Jesse Konstanty, Tr. 3/17/98 p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98 p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98 p. 36.

[38] See testimony of David Bernhard, April 7, 2004. Bernhard testified that in preparing for trial, the defense had difficulty finding evidence to corroborate the existence of an individual named "Sirena" and/or his presence at the Popeye's Restaurant the night Merry was attacked.

as to the presence of Sirena at or near the crime scene the night of the attack.[39]

In addition, Bernhard testified that with Detective Cline's notes and the Mahoney Report in hand – both of which contained references to the "Chelsea Square Apartments" and an individual named "Julio" – he might have "put something together" and determined that the "Julio" referenced in Detective Cline's notes and Julio Osorto referenced in the Mahoney Report were one and the same person, namely Sirena.[40]

Bernhard also testified that the Mahoney Report, which recorded the police stop of Julio Osorto with what appeared to be "ketchup stains" on his shirt, provided evidence of possible blood spatter in contradiction to the Commonwealth's expert testimony in support of a closed head wound. He said that he would certainly have "followed the matter up" further.[41] Even so, Bustillo's expert and lay testimony offered at the hearing failed to place blood on

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[39] *Id.* Bernhard further testified that, at trial, the Commonwealth made several references to the fact that the defense called only one witness in support of its position that Sirena, not Bustillo, was the assailant. Had the defense called Officer Mahoney to the stand to testify in support of its theory that Sirena was the actual assailant, Bernhard testified that this corroboration would have "enhanced" the defense's position.

[40] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived at Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998 state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002 hearing, the Commonwealth argued that it made no connection between the two men and did not know that "Sirena", a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

[41] Bernhard testified that, absent the Mahoney Report, he purposefully did not question witnesses at trial about Merry's injury or the presence of blood in order to reduce the risk of inflaming the jury.

Sirena or otherwise contradict the Commonwealth's expert testimony. If anything, the evidence was corroborative. In either case, it did not undermine confidence in the jury verdict.

Most importantly, notwithstanding all the information that might have been plumbed from Detective Cline's notes and the Mahoney Report, Bernhard nonetheless testified that he was not certain that either document "would have borne any fruit" or have "changed the outcome" of the trial. In fact, Bernhard testified that, even absent Detective Cline's notes and the Mahoney Report—both of which documented "Sirena" and/or "Julio's" presence at or near the crime scene—he was fully aware of other potential witnesses who could corroborate the existence of Sirena and place Sirena at the scene of the crime, including Jose Armando Amaya.[42] Notwithstanding, Bernhard made a "strategic decision" not to call those witnesses to testify.[43] Bernhard's commendable candor with the Court, especially when coupled with the respect he enjoys from the Court, was instrumental in addressing the fundamental issue presented.

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[42] In his letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney, Todd Sanders, informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats." In the same letter, Sanders also disclosed that "Sirena" was also known as "Julio".

[43] Bernhard testified that he was aware of several witnesses with "dubious credibility" who might have corroborated Sirena's existence and presence at the scene, but that the defense decided against calling such witnesses at trial, in particular Jose Armando Amaya, who had been detained by the authorities. Bernhard testified that he was "instructed by his client" not to talk to Jose Amaya, and that the defense viewed him as an "evidentiary threat," fearing that he would work with the prosecution in exchange for his freedom.

CONCLUSION

The jury, having heard evidence in support of both theories—that the assailant was either Bustillo or Sirena/Senior Julio—believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury.[44]

Upon a complete review of the entire record and a full consideration of the evidence presented on the issue of materiality, the Court finds that Bustillo failed to demonstrate a reasonable probability that the disclosure and use of either Detective Cline's notes and/or the Mahoney Report would have resulted in a different outcome at trial. Even accepting fully evidence that the victim suffered an open head wound and bled at the moment of impact, there is no evidence of any transfer of the victim's blood to the assailant. As a result, the materiality of the undisclosed evidence is simply absent.

In addition, although Detective Cline's notes and the Mahoney Report, if produced prior to trial, might have provided additional avenues for the defense to explore and perhaps bolster its theory that Sirena was the actual assailant, Bernhard conceded that, notwithstanding the nondisclosure of the police notes and report, the defense was aware of other witnesses with knowledge about Sirena, but made a strategic decision not to call them at trial. More importantly, as previously noted, Detective Cline's notes place Bustillo at the scene, a fact plainly at variance with Bustillo's alibi defense. Simply put, nothing was presented that suggests that the result of the original trial might have

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[44] *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

been different. Evaluating the case in context with the entire record, including the omitted evidence, the Court does not find that the jury would have entertained a reasonable doubt regarding Bustillo's guilt.

For these reasons, the Petition for Habeas Corpus Relief is denied.

An Order is enclosed.

Very truly yours,

/s/

R. Terrence Ney

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON
Respondent.

FINAL ORDER

This matter came before the Court on April 7, 2004 pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence that the Commonwealth failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

For the reasons stated in this Court's opinion letter dated May 4, 2004, which is attached hereto and made a part hereof, the Petition for Habeas Corpus Relief is DENIED.

This Order is FINAL. The Court notes the Petitioner's exceptions to this Order.

ENTERED this 4th day of May, 2004.

/s/
JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. ____

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR APPEAL

INTRODUCTORY STATEMENT

This matter arises from a petition for habeas corpus filed in the Circuit Court for Fairfax County; the principal claim for relief was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The sole issue at Mario Bustillo's first-degree murder trial was *who* struck James Merry with a baseball bat at the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997. At trial, three witnesses said that Bustillo, a Honduran national, committed the crime. Two eyewitnesses testified that Bustillo was not the killer and one identified another Honduran national known as "Sirena"—now known to be Julio Osorto—as the man who struck and killed Merry. The day after Merry died, Sirena left the country for Honduras. Since then, he has confessed to the slaying in a surreptitiously videotaped conversation.

It now turns out that prosecutors failed to disclose police reports that point directly to Sirena as the killer—even though the Commonwealth at trial mocked Bustillo's defense that Sirena swung the fatal blow. The *Brady* information includes the report of an officer who, canvassing the area shortly after the murder, stopped Sirena; observed what appeared to be "ketchup stains" on Sirena's shirt and pants; noted that Sirena gave inconsistent accounts of where he was coming from; and recorded that Sirena denied being at the Popeye's that evening (even though the government's own witnesses placed him there). The Commonwealth also failed to disclose investigator notes containing the statement of an eyewitness who equated "Sirena" with "Julio" and said that he saw Sirena cock a baseball bat as he approached the victim. The Circuit Court found that the suppressed reports were exculpatory and should have been disclosed under *Brady*, but ultimately held that the evidence was not "material." The latter conclusion defies both common sense and established precedent.

The Circuit Court also declined to address a violation of Bustillo's rights under Article 36 of the Vienna Convention on Consular Relations, December 14, 1969, 21 U.S.T. 77. That violation prevented Bustillo from presenting official evidence implicating Sirena as the perpetrator, and the Circuit Court's decision rejecting that claim both misapplies the treaty and creates an unnecessary conflict with recent International Court of Justice decisions.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In 1998, a Fairfax County jury convicted Bustillo of first-degree murder and sentenced him to 30 years in prison. Tr. 3/30/98 at 24. After the Circuit Court denied Bustillo's motions to set aside the verdict, Tr. 7/13/98 at 269; Order of Oct. 7, 1998, the Court of Appeals of Virginia affirmed the conviction, 2000 WL 365930, *3 (Va. App. Apr. 11, 2000). This Court denied the petition for appeal on January 17,

2001 (Record No. 001110), and the Supreme Court of the United States denied the petition for a writ of certiorari, 532 U.S. 1072 (2001).

On January 13, 2002, Bustillo filed a petition for a writ of habeas corpus in the Circuit Court for Fairfax County. On August 8, 2002, the Circuit Court held that Bustillo's Vienna Convention claim was time barred. Nonetheless, the Circuit Court ordered a hearing to determine whether the Commonwealth had improperly withheld two items of exculpatory evidence. Order of Aug. 8, 2002, at 4-5 (as amended by Order of Oct. 2, 2002). After a hearing on December 5, 2002, the court denied the petition.

While that matter was pending, Bustillo filed motions to compel the production of evidence relating to "Sirena" and in the case file generally. The Circuit Court granted the motions in part on October 2, 2002, and November 15, 2002. The prosecution then produced the police report of Officer Christopher Mahoney and, after Bustillo filed a motion for sanctions, the investigative notes of Detective Richard Cline. Officer Mahoney's report revealed for the first time that Mahoney had encountered Sirena in the area of the murder shortly after it occurred, that Sirena had what appeared to be "ketchup" stains on his shirt and pants, that he gave inconsistent statements about where he was coming from, and that he denied having been at the Popeye's restaurant that night. 63 Va. Cir. at 125, 127 n.6; Mahoney, C.J., Fairfax County Police Dep't Supp. Inv. Rep't, Dec. 10, 1997 (22:00 hrs) ("Mahoney Report") at 1. Detective Cline's notes revealed—also for the first time—that an eyewitness had seen Sirena at the crime scene approaching the victim with a "cocked" baseball bat. 63 Cir. Va. at 127 & n.5.

On September 16, 2003, the Circuit Court granted Bustillo's motion for reconsideration, holding that the failure to disclose those reports violated *Brady*. 63 Va. Cir. at 136. After an April 7, 2004, hearing, the Circuit Court concluded that the exculpatory evidence was not material and

denied Bustillo's habeas petition in full. Opinion of May 4, 2004, at 9.

Pursuant to Rule 5:17(a)(1), Bustillo filed a timely notice of appeal from the Circuit Court's final judgment. On July 23, 2004, this Court extended the time to file the petition for appeal to and including September 3, 2004. In the same order, the Court denied a motion to file transcripts of the December 5, 2002, and April 7, 2004, habeas hearings out of time.[1]

STATEMENT OF FACTS

There is no dispute that, as James Merry smoked a cigarette outside the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997, someone struck him in the head with a baseball bat; several days later, Merry died. The sole dispute has always been who swung the bat that killed Merry. The prosecution alleged that Mario Bustillo committed the crime. Bustillo has always insisted that another Honduran national known as "Sirena"—now known to be Julio Osorto—struck and killed Merry. The day after Merry died, Sirena left the United States for Honduras and has since confessed to killing Merry in a surreptitiously videotaped conversation.

This habeas case arises from the prosecution's failure to disclose to the defense the investigatory notes and police reports supporting Bustillo's claim that Sirena, not he, committed the crime. That material includes the report of an officer who, while canvassing the crime scene shortly after the crime, encountered Sirena; observed that he had

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[1] The transcripts of the December 5, 2002, and April 7, 2004, hearings on habeas relief are not necessary to resolve the questions presented by this case. The relevant facts are set forth in the Circuit Court's opinions below, the prior opinions on direct review, and the transcripts of the criminal trial filed with the district court. To the extent the Commonwealth wishes to cite or rely on the transcripts of the December 5, 2002, or April 7, 2004, habeas hearings, however, Bustillo waives any objection to consideration of those transcripts.

red stains (thought to be "ketchup") on his shirt and pants; noted that Sirena gave conflicting statements of where he was coming from; and recorded Sirena's false assertion that he had not been at the Popeye's that evening. The material also includes the statement of a witness who saw Sirena at the Popeye's approaching the victim, "cocked" baseball bat in hand. The case also concerns a violation of Article 36 of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, which prevented Bustillo from presenting additional evidence implicating Sirena, including irrefutable proof of Sirena's flight to Honduras the day after Merry's death. Indeed, once Sirena's travel to and presence in Honduras was verified—which his trial counsel could have done if Bustillo's Vienna Convention rights had been enforced—habeas counsel obtained Sirena's self-authenticating videotaped confession to the murder.

I. The Investigation And Trial

A. Pre-Trial Investigation And Proceedings

The fifteen to twenty youths in and around the Popeye's restaurant scattered when James Merry was attacked. Tr. 3/17/98 at 128, 219, 238. When police arrived on the scene at about 8:30 p.m., they found Merry lying "down on the ground outside" the Popeye's, "bleeding." Tr. 3/17/98 at 116 (Officer Milam); *id.* at 133, 139 (Michelle Gutierrez); *id.* at 223 (Jesse Konstanty). "[T]he evidence also showed that there was blood at the scene, including photographic evidence of what appeared to be" drops of "blood spatter." 63 Va. Cir. at 131 (footnote omitted); Tr. 3/17/98 at 139, 226; Commonwealth Tr. Exh. 1 (photograph).

At about 10:00 p.m. that evening, while canvassing the area around the crime scene, Officer Christopher Mahoney stopped "Julio C. Osorto," now known to be "Sirena." According to Officer Mahoney's report, Sirena "had what appeared to be ketchup" on his shirt and pants. Mahoney

Report at 1. Sirena gave conflicting statements about where he was coming:

> [Mr. Osorto] claimed he had come from McDonald's .... Mr. Osorto originally stated he was coming from his cousin[']s residence on Cumberland Ave., then he stated he was coming from Commerce St. . . . He stated he lived at Chelsea Square Apts. but was confused on the address.

Ibid. When asked whether he had been at Popeye's that evening, Sirena "stated he was not at Popeye[']s." *Id.* at 1-2. According to the report, Sirena's breath smelled of alcohol. *Id.* at 2. Officer Mahoney's report was not disclosed to the defense until four years after trial.

The evening of the murder, officers gathered several witnesses at the police station. Tr. 3/18/98 at 39. Between 3:00 a.m. and 4:00 a.m., Detective Richard Cline showed an array of six photographs to witnesses Michelle Gutierrez and Jesse Konstanty. *Id.* at 39-41, 165-168. The array included Bustillo's photograph, but it did not include a photograph of Sirena or any other person present when the attack occurred. *Id.* at 56. Gutierrez and Konstanty, who had met Bustillo before, identified Bustillo as the assailant. *Id.* at 41. Bustillo was arrested that morning while attending high school. *Id.* at 41, 43, 53, 68. Although Bustillo is a Honduran national, he was not advised of his right under the Vienna Convention to consult with the Honduran Consulate; nor were Honduran officials notified of his arrest.

Around January 7, 1998, Detective Cline interviewed eyewitness Jose Armando Amaya. According to Detective Cline's notes, Jose Amaya saw both Sirena and Bustillo at the Popeye's restaurant that evening. Although he "[d]idn't see the bat hit the head" and "[c]ouldn't tell who actually hit the guy," Jose Amaya said that he "[s]aw Sirena take bat from shirt" and "cock it." Det. Cline Notes from Jan. 7, 1998, Interview with Jose Amaya at 3 ("Det. Cline Notes");

63 Va. at 127 n.5 ("Amaya observed 'Sirena' at the scene with a 'bat cocked.'"). Jose Amaya said that Sirena had lived in the Chelsea Square Apartments, the same apartment identified by Sirena when Officer Mahoney stopped him the night of the murder. Det. Cline Notes at 4. Jose Amaya also stated that Sirena left the area by December 31, 1997. *Ibid.* The Detective's earlier notes likewise indicated that Sirena was at Popeye's around the time of the murder. Det. Cline Notes of N. Parada Interview, Dec. 18, 1997, at 1. Like the Mahoney Report, the Cline notes revealing that Jose Amaya saw Sirena approaching the victim with a cocked bat were not disclosed until 2002.

At a preliminary hearing held on December 29, 1997, Bustillo's trial counsel reminded the prosecution of its obligation under *Brady* to disclose all exculpatory material. Tr. 12/29/97 at 5. More than two months later, about two weeks before trial, the prosecution sent a series of letters purporting to "summarize" the exculpatory information in its possession. The prosecution did not disclose Officer Mahoney's report of his encounter with Julio Osorto (Sirena) while canvassing the area around the crime. It thus did not mention that Mahoney observed red stains that looked like "ketchup" on Sirena's clothing; that Sirena gave inconsistent statements about where he was coming from; and that Sirena (falsely) denied being at the Popeye's that night. In a letter dated March 9, 1998, the Commonwealth did disclose that eyewitness Jose Amaya had "told law enforcement that he saw [Bustillo] and Sirena at the scene and that both had bats," and that Jose Amaya "couldn't tell which one struck the victim." Letter of Mar. 9, 1998, at 2. Unlike Detective Cline's notes, however, the letter did *not* mention that Jose Amaya reported seeing Sirena with his "bat cocked." 63 Va. Cir. at 131 & n.7.

B. The Trial

There was no physical evidence connecting Bustillo to the crime. The prosecution therefore relied on the testi-

mony of three eyewitnesses (Michelle Gutierrez, Jesse Konstanty, and Valeria Landaeta) who claimed that they saw the attack from within the Popeye's restaurant. They admitted that the attack lasted only seconds and that, although the attack occurred outside the restaurant after dark, their observations were made from within the well-lighted restaurant, through a glass window that was partially obstructed by the advertising poster against which Merry was leaning. Tr. 3/17/98 at 127-28, 131, 142, 157, 161, 222, 241-42, 249, 251; Tr. 3/18/98 at 20, 25, 27-28, 30. They also agreed that, after the attack, they had discussed with each other whom they thought the attacker had been. Tr. 3/17/98 at 252-53; Tr. 3/18/98 at 31-32. They ultimately identified Bustillo as the assailant, relying in part on their belief that he was the only one wearing a red shirt. Tr. 3/17/98 at 131, 222; Tr. 3/18/98 at 36. The prosecution also offered the testimony of Detective Cline, who said that no one he interviewed identified anyone other than Bustillo as the attacker. Tr. 3/18/98 at 69.

Bustillo presented the testimony of two eyewitnesses who were standing outside the restaurant, just steps away from Merry, when the attack occurred. Amilcar Amaya testified that he was just leaving the Popeye's when he saw Sirena approach James Merry, take out a baseball bat, and strike Merry in the head. Tr. 3/18/98 at 100-01. Christina Hondoy testified that, shortly before the attack on Merry, she had stepped out of the Popeye's with a friend (Yahayra Queirolo) to smoke a cigarette. Tr. 3/18/98 at 141-42. She had just turned to speak with Merry, who was smoking a cigarette steps away, when she saw someone strike Merry in the head with a baseball bat. *Id.* at 142. She stated unequivocally that, although she did not know the person who assaulted Merry, she knew that it was *not* Bustillo. *Ibid.* Honday further testified that, after a preliminary hearing, she told Detective Cline that the person she saw at the hearing, Mario Bustillo, was not the person who struck

Merry. Tr. 3/18/98 at 143, 191. According to Hondoy, Cline told her "[not to] worry about it," and that she probably would not be needed at trial. *Ibid.*

Ulma Martinez testified that, the day after James Merry died, she saw Sirena on a flight to Honduras. On cross-examination, Martinez admitted she did not know Sirena's last name. Tr. 3/18/98 at 168-69. Two of Bustillo's high school teachers testified that Bustillo's demeanor the day after the assault was inconsistent with that of a murderer. *Id.* at 115-18, 132-35, 142.

In closing argument, the prosecution disparaged Bustillo's defense that Sirena had committed the murder, urging that there was no credible evidence that Sirena, rather than Bustillo, had swung the bat that killed Merry. Tr. 3/19/98 at 18, 23, 76. The prosecutor dismissed Amilcar Amaya as a "gang member," *id.* at 19-20; Christina Hondoy, the prosecutor also argued, had been given loans by the Bustillo family, *id.* at 21-23. The "whole Sirena thing," the prosecutor mocked, was very "convenient" because "Sirena apparently isn't available." *Id.* at 20. Referring to "this so-called Sirena," the prosecution pointed out that neither Amilcar Amaya (who testified that he saw Sirena strike James Merry), nor Ulma Martinez (whom prosecutors characterized as having "supposedly" seen Sirena flee to Honduras the day after Merry's death) actually "kn[e]w his full name." And the prosecutor pointed out that no one had produced "plane tickets . . . for this Sirena." *Id.* at 20-21, 76.

Neither the judge, the jury, nor the defense knew that Jose Amaya had told Detective Cline that he saw "Sirena—Julio" of the Chelsea Park Apartments approach Merry with a "cocked" baseball bat. Nor was anyone but the prosecution aware that Officer Mahoney stopped Sirena of the Chelsea Park Apartments while canvassing the crime scene; that Sirena had red stains on his shirt and pants; that Sirena gave inconsistent statements about where he had been; and that Sirena lied about being at the Popeye's that

evening. And because Bustillo's right to contact the Honduran Consulate was ignored, the jury never saw the picture of Sirena that the Consulate would have provided to the defense; the official records of Sirena's flight the day after Merry's death (corroborating a key defense witness); or the testimony of numerous witnesses who, when later presented with pictures of Sirena, identified him as the assailant.

The jury returned a verdict of guilty and sentenced Bustillo to 30 years' imprisonment. The Virginia Court of Appeals affirmed the conviction. This Court denied the petition for appeal, and the United States Supreme Court denied further review.

II. The Habeas Corpus Action

A. The Petition

Bustillo filed a petition for a writ of habeas corpus in the Circuit Court for Fairfax County based on newly discovered evidence, violations of the duty to disclose exculpatory evidence under *Brady*, and a violation of the Vienna Convention on Consular Relations.

1. *New Evidence and Vienna Convention Claims.* The new evidence consisted of, among other things, a surreptitiously recorded videotape in which Sirena admitted killing Merry. Habeas Pet., Exh. 9, at 3, 4. The confession matched the trial testimony perfectly. With respect to the tremendous force of the blow, Sirena bragged: "When I smashed [Merry] with that blow . . . I heard that son of a bitch sound like a big box." *Id.* at 6. Consistent with the witness testimony, Sirena stated that he attacked Merry while Merry was outside the Popeye's smoking a cigarette. *Id.* at 1, 3-4. Consistent with testimony that the attacker was wearing red, Sirena stated that he was wearing a red sweater. *Id.* at 3, 7. And consistent with Officer Mahoney's (at that point still undisclosed) observation that Sirena's breath smelled of alcohol when he was stopped after the

attack, Sirena stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. *Id.* at 6-7.

The habeas petition included a copy of the videotaped confession and the affidavits of four eyewitnesses who swore that, upon viewing the videotape, they "recognized the individual facing the camera" (Sirena) as the person they saw "committing the December 10, 1997, assault" on Merry. Habeas Pet. Exhs. 11-14. It also included sworn affidavits by several witnesses who, based on a photograph of Sirena belatedly produced by Fairfax County Police Officer Gelabert, identified Sirena as the attacker; several witnesses claimed that they had not come forward earlier because they feared being deported. *Id.* Exhs. 16, 21, 22, 29, 32.

With respect to the Vienna Convention violation, Bustillo executed an affidavit attesting that, if he had been advised of his rights under the Vienna Convention, he would have invoked them. Habeas Pet. Exh. 14B (Aff. of Dec. 13, 2001). The Honduran Consulate averred that, had it been apprised of the case, it would have (at a minimum) confirmed Sirena's nationality, provided official records of his arrival in Honduras just after Merry's death, and provided a picture of Sirena. Letter of Feb. 20, 2002 from Nat'l Comm'r of Human Rights, Republic of Honduras, to Gov. of Virginia; Amicus Brief of the Embassy of Honduras (filed in Circuit Court Apr. 29, 2002). On August 8, 2002, the Circuit Court denied much of Bustillo's habeas petition, including his new evidence and Vienna Convention claims, holding the latter to be time-barred. Opinion of Aug. 8, 2002, at 7 (as amended by Order of Oct. 2, 2002).

2. *The* Brady *Claim.* The habeas petition also alleged that the prosecution had unlawfully withheld exculpatory evidence in violation of *Brady*, *supra*. The Circuit Court ultimately granted a motion to compel production of the investigation files and all information that the Commonwealth had about "Sirena." On October 19, 2002—more than four

years after the trial—the prosecution for the first time disclosed Officer Mahoney's report of his encounter with Sirena while canvassing the crime scene, describing the document as "[a] self-explanatory police report taken shortly after the attack." Letter of October 19, 2002.

The Commonwealth's letter also referred to "the notes of Detective Cline," stating that they "contain scattered references to 'Sirena' as a person present at the scene. A note dated December 18, 1997, contains the following notation: 'Sirena – Julio' as being one of the persons present at the scene." *Ibid.* The Commonwealth's attorneys, however, refused to produce Detective Cline's notes, insisting that "the relevant part of those notes was disclosed . . . during pre-trial discovery by letter dated March 9, 1998." Only after Bustillo filed a motion for sanctions were copies of the actual notes produced. Unlike the prosecution's pre-trial *Brady* "summary," Detective Cline's actual notes indicated that eyewitness Jose Amaya had seen Sirena pull out a bat and "cock[ ] it." See pp. 4, 6, *supra*.

B. The Circuit Court's Determination That The Evidence Is Exculpatory

Based on that evidence, the district court granted reconsideration of its decision denying habeas relief, holding that the prosecution should have disclosed the investigatory reports and notes. Under *Brady*, the Circuit Court explained, "[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 63 Va. Cir. at 128. Because both Officer Mahoney's report and Detective Cline's notes "unquestionably implicate 'Sirena' . . . as a possible suspect," the Circuit Court held that they "must be deemed exculpatory," and should have been disclosed to the defense. *Id.* at 131.

The Circuit Court explained that the prosecution had disclosed evidence in Detective Cline's notes favorable [to] its case, but that it had "failed to disclose that [Jose] Amaya also told Detective Cline that he observed Sirena holding a bat in a 'cocked' position. This latter piece of information not only makes clear that Sirena was present at the scene, but implicates Sirena as the actual assailant." 63 Va. Cir. at 131. The Circuit Court also agreed that the Mahoney Report implicated Sirena: The fact that "an individual named Julio Osorto was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing," the Circuit Court stated, "must be deemed exculpatory." *Id.* at 129. Although the fatal blow to Merry produced a "closed head wound" (*i.e.*, the blow did not break the skin), and no blood was found on the baseball bats recovered near the scene, the Circuit Court concluded that the red stains were relevant because "photographs of the crime scene depict[] what appears to be blood spatter." *Id.* at 131-132 & n.18; *id.* at 129 ("The Commonwealth was certainly aware that Merry's blood was found at the scene."). Because there was "testimony identifying 'Sirena—Julio' as the assailant, . . . the stopping of a 'Julio' near the crime scene at the time of the incident with red stains on his clothes, is exculpatory in nature[,] warranting its production to the defense prior to trial." *Id.* at 132; *see id.* at 135. The Circuit Court ordered a "limited hearing" on materiality. *Id.* at 132.

C. The Ruling On Materiality

At the hearing, and in response to the Circuit Court's apparent concern that blood spatter evidence might be inconsistent with Merry's "closed" head wound, Bustillo presented the testimony of Dr. Bernad, a licensed neurologist. Dr. Bernad testified that such traumatic blows to the head, even if they produce a "closed" wound, can often cause blood to "aerate" (*i.e.*, to spray) "from the ear immediately upon impact." Opinion of May 4, 2004, at 5; *see ibid.* (noting

"Dr. Bernad's testimony that blood would have 'sprayed/aerated' from the victim's ear at some point upon or immediately after impact"). Two eyewitnesses, Yahayra Quieroloa and Amilcar Amaya, testified that they saw blood spray when Merry was struck. *Id.* at 6.

Defense counsel from Bustillo's original trial testified that, because he had argued that Sirena was the actual assailant, he was "'shocked' to learn [of] the existence of Detective Cline's notes and the Mahoney Report." Opinion of May 4, 2004, at 8. He stated that, had he been aware of the Mahoney Report, he likely would have called Officer Mahoney to testify regarding his encounter with Sirena to bolster his contention that Sirena was the assailant. *Id.* at 8 & n.39. Moreover, because of the prosecution's "several references" at trial "to the fact that the defense called only one witness in support of its contention that Sirena, not Bustillo, was the assailant," counsel "testified that this corroboration would have 'enhanced' the defense's position." *Id.* at 8 n.39. *See also id.* at 7 n.38 (noting the difficulty of proving Sirena's existence and "presence at the Popeye's Restaurant the night Merry was attacked").

Following the hearing, the Circuit Court ruled that the suppressed evidence was not material. The Circuit Court stated its belief that, on habeas review, it "cannot consider or evaluate the weight or credibility of evidence presented to the jury" at the original trial. Opinion of May 4, 2004, at 9. The Circuit Court did, however, opine on the weight and credibility of the withheld exculpatory evidence. With respect to the red stains on Sirena's shirt, the court downplayed the expert testimony that blood aerated from Merry's ear on impact because (according to the court) "the crime scene photos revealed no signs of blood 'spray,' 'splatter' or droplets, but rather only a few sizable drops of blood the Court finds consistent with blood seepage, not blood spatter." *Id.* at 5. It belittled Yahayra Quieroloa's testimony that she saw blood coming from Merry's ears, be-

cause she previously had stated that she saw blood explode from his ears, nose, and throat, and because she could not recall how quickly the blood spray appeared after the blow. *Id.* at 6. And the court devalued Amilcar Amaya's testimony "that upon impact, he observed blood spray 'in the direction of' and 'over' Sirena" because Amilcar Amaya did not himself observe blood on Sirena's shirt and did not mention the blood in his trial testimony or post-trial affidavit. *Id.* at 6-7.

Finally, the Circuit Court relied heavily on the testimony of Bustillo's trial counsel. Although Bustillo had accused trial counsel of rendering constitutionally ineffective assistance by failing to present additional defense witnesses, the Circuit Court deemed trial counsel's concession that he was not certain that disclosure of the *Brady* evidence would have altered the trial's outcome to be "instrumental" to its resolution of the case. Opinion of May 4, 2004, at 9.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying Bustillo's petition for habeas corpus on the ground that the unlawfully withheld *Brady* evidence was not material.

2. The Circuit Court erred by attempting to reconcile the belatedly produced exculpatory evidence with a guilty verdict, rather than attempting to assess the possible impact that evidence could have had upon a reasonable juror.

3. The Circuit Court erred by failing to address the impact of Sirena's inconsistent statements to Officer Mahoney on the night of the attack.

4. The Circuit Court erred when it failed to consider the impact of the wrongfully withheld evidence in light of the divided eyewitness testimony presented at trial.

5. The Circuit Court erred in affording "instrumental" significance to the self-serving testimony of trial counsel that he was "uncertain" of the impact that the wrongfully withheld evidence could have had on the jurors at trial.

6. The Circuit Court erred in holding that Bustillo's claim under Article 36 of the Vienna Convention on Consular Relations was procedurally barred.

QUESTIONS PRESENTED

1. Whether wrongfully withheld, exculpatory evidence was material to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), where that evidence showed that the person who the defendant claimed actually committed the murder was stopped and interviewed by police near the crime scene on the night of the attack, with red "ketchup" stains on his shirt and pants; that he gave the officer false and inconsistent statements about where he was coming from and had been; and was seen by a witness at the crime scene approaching the victim with a "cocked" baseball bat; and where the prosecution repeatedly suggested to the jury that the "so-called" alternative suspect was a "convenient" defense contrivance.

2. Whether the Circuit Court applied the wrong *Brady* materiality standard by (a) attempting to reconcile the wrongfully withheld, exculpatory evidence with the guilty verdict, rather than evaluating the impact it could have had upon a reasonable juror in the context of a trial; (b) selectively crediting certain pieces of evidence arguably consistent with the verdict while disregarding other, persuasive evidence to the contrary; (c) failing to assess the impact of improperly suppressed exculpatory evidence in light of the divided eyewitness evidence; and (d) deeming "instrumental" and misreading the self-serving testimony of Bustillo's trial counsel.

3. Whether the Circuit Court properly refused to consider Bustillo's claim under the Vienna Convention on Consular Relations due to an asserted procedural bar.

4. Whether the Commonwealth violated Bustillo's right to contact consular officials under the Vienna Convention, where the omission prevented defense counsel from identi-

fying the alternative suspect for eyewitnesses who later recognized him as the actual assailant; documenting the suspect's flight to Honduras just days after the crime occurred and one day after the victim's death (corroborating the testimony of a key defense witness); and obtaining the suspect's surreptitiously videotaped, self-authenticating confession to the crime.

ARGUMENT

In the Circuit Court, while still clinging to the notion that it had not improperly withheld *Brady* material, the Commonwealth's attorneys characterized Bustillo's habeas petition as "conjur[ing] a nightmarish scenario . . . worthy of a novel by George Orwell." Regrettably, it is now apparent that such a "nightmarish scenario" did occur. Critical evidence that would have supported Bustillo's innocence, corroborated crucial defense witnesses, and eviscerated the prosecution's repeated suggestions to the jury that the alternative assailant (Sirena) was a convenient defense contrivance, was wrongfully withheld for more than four years.

The sole issue before the jury at Mario Bustillo's murder trial was whether Bustillo struck the victim with a baseball bat, as the prosecution urged, or whether someone known as "Sirena" did. It now turns out that the prosecution withheld from the defense a police report indicating that a police officer, while canvassing the murder scene shortly after the crime, stopped the individual now known to be Sirena; observed "what appeared to be ketchup" on his pants and shirt; noted that Sirena gave inconsistent accounts of where he was coming from; and recorded Sirena's false statement that he had not been at the Popeye's that evening (even though the prosecution's own witnesses placed him there). The prosecution likewise failed to disclose the notes of a detective indicating that an eyewitness to the murder not only saw Sirena at the

murder scene with a baseball bat, but also saw Sirena "cock" his bat just before the victim was struck.

As the Circuit Court found, there can be no doubt that the withheld evidence is exculpatory. It directly supports Bustillo's theory that Sirena, and not he, swung the bat. The Circuit Court's later conclusion that the suppressed evidence was not "material" is not only counter-intuitive but also the result of clear legal error. Contrary to the directions of this Court and the United States Supreme Court, the Circuit Court attempted to *reconcile* the suppressed evidence with the verdict, rather than *evaluate* the impact it would have had upon reasonable jurors. Moreover, the Circuit Court refused to determine materiality in light of the strength of the evidence at the original trial. Again contrary to this Court's precedents, the Circuit Court failed to account for possible changes in trial strategy that would have occurred absent the *Brady* violation. At bottom, the Circuit Court effectively displaced the standard of materiality under *Brady*—whether there was a reasonable probability that the suppressed evidence would have raised a reasonable doubt *in the mind of a juror*—with an effort to draw inferences in favor of guilt while rejecting compelling inferences consistent with Bustillo's innocence.

Finally, the Circuit Court erroneously refused to consider Bustillo's claim under Article 36 of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, even though the violation produced material prejudice. The Consulate of Honduras has represented that, if Bustillo had been advised of his rights and the Consulate notified of his arrest (as required by the Treaty), it would have been able to confirm Sirena's existence; prove through official records that Sirena fled the United States and entered Honduras the day after the victim died; and provided a photograph of Sirena to permit his identification as the culprit (as many witnesses did when presented with a photograph of Sirena after trial). Moreover, once Sirena was located in Hon-

duras, Bustillo's counsel was able to obtain Sireña's self-authenticating, videotaped confession to the crime. The Circuit Court's reliance on a time-bar is inconsistent with a binding treaty obligation and places Virginia law in conflict with recent judgments of the International Court of Justice, an international body entitled to deference on matters of treaty interpretation.

I. The Circuit Court Wrongly Concluded That The Exculpatory Evidence Was Not Material Under *Brady*

Under *Brady v. Maryland*, the government's suppression of "evidence favorable to an accused upon request violates due process where the evidence is material either to *guilt* or to *punishment*, irrespective of the good faith or bad faith of the prosecution." *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E. 2d. 514, 517 (1998) (quoting *Brady*, 373 U.S. at 87) (emphasis added). It is undisputed that the evidence at issue here was "exculpatory" within the meaning of *Soering* and *Brady*. Consequently, the conviction must be reversed if the evidence was "material." *Ibid*; *Frontilla v. Commonwealth*, 38 Va. App. 220, 226, 562 S.E.2d 706, 709 (2002).

Evidence is material if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Soering*, 255 Va. at 464, 499 S.E. 2d at 517 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). That standard is lower than a showing of "more likely than not." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Moreover, because a criminal defendant may be convicted only by proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361 (1970), suppressed evidence is material if "there is a reasonable probability that," absent its suppression, "the factfinder would have had a *reasonable doubt* respecting guilt." *Strickland*, 466 U.S. at 695; *Kyles*, 514 U.S.

at 434. Consequently, the question here is whether there is a "reasonable probability" that a single juror would have found a reasonable doubt as to whether Bustillo or Sirena swung the fatal blow. Contrary to the decision below, the answer is unquestionably "yes."

A. The Suppressed Evidence—That The Alternative Suspect Was Seen Approaching The Victim With A "Cocked" Baseball Bat And Was Found By Police Shortly Thereafter Near The Crime Scene, With Red Stains On His Clothes, Offering Inconsistent Statements, And Lying About Having Been At The Crime Scene Earlier—Was Material

The *Brady* evidence at issue here raises far more than a *reasonable probability* that, had prosecutors fulfilled their duty to produce exculpatory evidence, at least one juror would have had a reasonable doubt as to Bustillo's guilt. Bustillo's defense, after all, was that Sirena swung the bat. The wrongfully withheld notes of Detective Cline state that an eyewitness saw Sirena—also a Honduran national—cock a baseball bat as he approached the victim at the Popeye's. And the wrongfully withheld Mahoney Report documents a police encounter with Sirena near the crime scene shortly after the attack. That report reveals that Sirena had "what appeared to be ketchup" stains on his clothing, gave conflicting statements about where he was coming from, and falsely denied having been at the crime scene. Such evidence cannot credibly be dismissed as immaterial to the defense.

1. *The Evidence Is Compelling Proof Of Misidentification*

Particularly where a case turns on eyewitness testimony alone, evidence supporting a claim of misidentification is often critical. For that reason, this Court and others repeatedly have found the failure to disclose evidence sup-

porting such a claim to be material—whether the evidence shows inconsistencies in descriptions, or places alternative suspects with similar physical characteristics at the scene—even where that evidence is far less compelling than the evidence here. *See, e.g., Bowman v. Commonwealth*, 248 Va. 130, 445 S.E.2d 110 (1994); *Davis v. Commonwealth*, 25 Va. App. 588, 491 S.E.2d 288 (1997).

In *Bowman*, for example, prosecutors failed to produce a police report containing a partially inaccurate physical description of the defendant, which corroborated the defendant's claim that police had mistakenly identified him as the perpetrator. 248 Va. at 132, 445 S.E.2d at 112. This Court reversed the conviction, concluding that, even though most of the report's contents were revealed in direct testimony, the report itself was both exculpatory and material to the defense because its suppression prevented the defendant from fully pursuing his defense that the officer mistakenly identified him. "[H]ad [the defendant] been aware of the discrepancy between [the officer's] report and [the defendant's] actual size, and [the report's] failure to mention [the defendant's] facial scars as identifying features in the report," the Court explained, the defendant "reasonably may have taken different and potentially significant actions which could have strengthened [the misidentification] defense." *Id.* at 134-35, 445 S.E.2d at 112.

Here, the prosecutors' failure to turn over the Mahoney Report and Detective Cline's notes likewise prevented the defense from conclusively establishing the presence of Sirena—a Honduran national sharing Bustillo's basic description[2] —at the crime scene. And, as in *Bowman*, the

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[2] The Mahoney Report describes Sirena as between five feet, six inches and five feet, eight inches tall, weighing between 160 and 180 pounds. Mahoney Report at 1. Detective Cline testified at trial that a witness described Bustillo as 'in the neighborhood of five-seven to five-eight, stocky build." Tr. 3/18/98 at 58.

prosecutors' error prevented Bustillo's trial counsel from calling additional witnesses (including Officer Mahoney) to testify in furtherance of the misidentification defense. Opinion of May 4, 2002, at 8 & n.39. Indeed, the evidence here went far beyond mere physical attributes of people present. It would have established that a witness saw Sirena approaching the victim with a "cocked" bat in hand, and that the police encountered Sirena nearby a short time later, with red stains on his clothing, unable to provide a consistent account of where he was coming from. The Circuit Court's conclusion here is irreconcilable with this Court's more realistic view of materiality in *Bowman*.

Nor can the decision below be squared with *Davis*. There, the defendant challenged her identification as the perpetrator but prosecutors refused to turn over information regarding the presence of women of the same race in the same area on the day of the crime. Upholding the defendant's *Brady* challenge, the Court of Appeals concluded that "[t]he existence of evidence that other African-American females were seen in the vicinity of 2100 Main Street that same day might have a tendency to prove [the defendant's] defense that she was not the person [the officer] observed selling drugs . . . ." 25 Va. App. at 598, 491 S.E.2d at 293. The Court of Appeals also required the police to turn over information regarding other women who had been arrested on or near that block the same day for selling drugs. "The identity of women who were later arrested for selling drugs from that locale was material . . . because it tended to support [the] defense of misidentification." *Id.* at 598-99, 491 S.E.2d at 293 (citing *Bowman*, *supra*). Similarly, prosecutors here failed to turn over information documenting a police encounter with another Honduran national with *red stains* on his shirt *and* pants, proximate in time and place to a bludgeoning murder. If the generic physical information sought in *Davis* was material, surely the far more detailed and highly exculpatory

information withheld here is as well. *See also Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 810-11, 829-30 (10th Cir. 1995) (undisclosed report establishing that police found alternative suspect near crime scene with blood-stained clothing material under *Brady*).

2. *Sirena's False And Inconsistent Statements To Officer Mahoney Are Probative Evidence Of His Having Perpetrated The Attack*

The Mahoney Report also records that Sirena, in his short encounter with police, gave inconsistent statements about where he was coming from. Sirena "claimed he had come from McDonald's," but "originally stated he was coming from his cousin[']s residence on Cumberland Ave[nue], [and] then he stated he was coming from Commerce St[reet]." Mahoney Report at 1. This Court and others have often observed that "much weight is given to contradictory statements of material facts," *Toler v. Commonwealth*, 188 Va. 774, 781, 51 S.E.2d 210, 213 (1949), since "inconsistencies and contradictions" can "support an inference of guilty knowledge," "elevat[ing] suspicion to the level of probability," *Hyde v. Commonwealth*, 217 Va. 950, 975, 234 S.E.2d 74, 77-78 (1977). "A jury may properly consider . . . contradictory or inconsistent statements to the police as circumstantial evidence demonstrative of a guilty state of mind." *Ortega v. Commonwealth*, 1996 WL 31998, at *2 (Va. App. Jan. 30, 1996) (citing *Black v. Commonwealth*, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981)). Inconsistent statements are often "the strongest evidence of a criminal defendant's guilty knowledge"; they are so "inherently suspicious" that a "factfinder could reasonably conclude that they mask an underlying consciousness of guilt." *United States v. Diaz-Carreon*, 915 F.2d 951, 955 (5th Cir. 1990).

The Mahoney Report also memorializes a clear lie—Sirena's claim that "he was not at the Popeye[']s" that evening. Mahoney Report at 1-2. The prosecution's own

witnesses, however, placed Sirena at the Popeye's that night. Tr. 3/17/98 at 129, 263, 271. (Jose Amaya's suppressed statement to Detective Cline, moreover, placed Sirena there with a cocked baseball bat in hand. *See* pp. 4, 6, *supra*.) Sirena's false denial is, like his inconsistent statements, evidence "that he [was] trying to conceal his guilt." *Black*, 222 Va. at 841-842, 284 S.E.2d at 610; *Toler*, 188 Va. at 782, 51 S.E.2d at 214 ("untrue account of his whereabouts"); *United States v. Johnson*, 64 F.3d 1120, 1128 (8th Cir. 1995). Finally, the report suggests that Sirena's encounter with the police (after hiding out in a field) may have so unnerved him that he "was confused" about his *own address*. Mahoney Report at 2. That Sirena was so disturbed also evidences his guilt, *United States v. Burgos*, 94 F.3d 849, 872 (4th Cir. 1996), and starkly contrasts to Bustillo's demeanor in school the day after the attack. *See* Tr. 3/18/98 at 118-119, 133-134.

3. *Detective Cline's Notes Provide Crucial Corroboration Of Bustillo's Defense And Sirena's Guilt*

The undisclosed notes of Detective Cline make the prejudice to Bustillo all the more obvious. Those notes "equat[ed] Julio and Sirena" and "indicat[ed] that Sirena held a 'cock[ed] bat'" just before Merry was struck. Opinion of May 4, 2004, at 3. They thus placed Sirena at the murder scene, *Davis*, 25 Va. App. at 598-99, 491 S.E.2d at 293, in direct conflict with what Sirena told Officer Mahoney. Moreover, they placed him there coming at the victim Merry with a "cocked" baseball bat in hand. Taken together with the eyewitness who identified Sirena as the perpetrator at Bustillo's trial, that evidence certainly would have been sufficient to indict and perhaps convict Sirena as the perpetrator. Indeed, like the defendant whose conviction this Court upheld in *Toler*, Sirena's presence at the crime scene (with a cocked bat), his "failure to give a satisfactory explanation therefore, his untrue account of his whereabouts, and his contradictory statements"—not to

mention the red stains on his shirt and pants—"furnish bases for reasonable inferences that his explanations were made falsely in an effort to conceal his guilt. . . . In other words, the facts established are consistent with his guilt and inconsistent with his innocence." 188 Va. at 782, 51 S.E.2d at 214. Since the evidence would have been sufficient to charge and maybe even *convict* Sirena as the perpetrator, *a fortiori* it raises a *reasonable probability* that a jury might have entertained a *reasonable doubt* about Bustillo's guilt.

4. *The Suppressed Evidence Could Have Dramatically Altered The Defense's And Prosecution's Trial Strategies*

The suppressed evidence, moreover, could have entirely altered the strategy of defense and prosecution alike at trial. Capitalizing on the defense's "difficulty finding evidence to corroborate the existence of an individual named 'Sirena,'" Opinion of May 4, 2004, at 7 n.38, the prosecution made Sirena out to be a phantom. In closing arguments, the prosecutor referred to him as "this so-called Sirena"; observed that no one seemed even to know his last name; and repeatedly called him and his unavailability "convenient." Tr. 3/19/98 at 20, 76. Officer Mahoney's report, however, would have turned the "so-called Sirena" into a real person with a first and last name—Julio Osorto—and placed him near the scene of the crime, with red stains on his clothes, giving inconsistent statements, and falsely denying having been at the Popeye's.

Moreover, disclosure would have led to additional compelling evidence for use at trial. For example, when habeas counsel learned of Sirena's real name, he was able to obtain a picture of Sirena. That picture allowed witness after witness unequivocally to identify him as the actual assailant. Surely that could have tipped the balance in favor of reasonable doubt in the mind of at least one juror. Counsel also would have been able to prove Sirena's flight the day after Merry died. See pp. 33-34, *infra*. Further, once he was

armed with Sirena's real name, habeas counsel was able to obtain a surreptitiously recorded videotape of Sirena confessing with self-authenticating detail. The confession did not merely match other trial testimony. *See* p. 10, *supra*. It corresponded with then still-undisclosed details in the Mahoney Report: Consistent with that Report's observation that Sirena's breath smelled of alcohol when he was stopped after the attack, for example, Sirena stated in his confession that, after striking Merry, he hid out in a field and drank a six-pack of beer. Compare Mahoney Report at 2 with Habeas Pet., Exh. 9, at 6-7. More powerful evidence of Sirena's guilt—and Bustillo's innocence—is difficult to imagine.

The jury's verdict and 30-year sentence, moreover, were both based on the belief that Bustillo swung the fatal blow that killed Merry. Had Bustillo been provided the evidence supporting Sirena's involvement, Bustillo might have conceded his presence at the Popeye's on the night in question but identified Sirena as the attacker—a strategy that was not realistically open to Bustillo without additional evidence of Sirena's existence and whereabouts.

5. *In The Context Of A Trial Rife With Conflicting Eyewitness Testimony, The Cumulative Effect Of The Additional Exculpatory Evidence Is Overwhelming*

Once the suppressed evidence is "evaluated in the context of the entire record," including the testimony at trial, the prejudice becomes inescapable. *Kyles*, 514 U.S. at 461 (quoting *Agurs*, 427 U.S. at 112); *see Lovitt v. Warden*, 266 Va. 216, 245, 585 S.E.2d 801, 818 (2003) ("[T]he determination whether undisclosed exculpatory evidence was material must be made by considering its cumulative effect."); *Soering*, 255 Va. at 464, 499 S.E.2d at 517. This was a hotly-contested case. No physical evidence connected Bustillo to the murder, and the jurors were confronted with sharply conflicting eyewitness accounts. The Common-

wealth's three eyewitnesses identified Bustillo as the assailant. But they purported to observe the attack—which occurred outside the Popeye's restaurant after dark—from a table inside that well-lighted establishment. The window, moreover, was partially obstructed by a poster. *See* Tr. 3/17/98 at 157, 158; p. 7, *supra*. In contrast, two other eyewitnesses testified that Bustillo was *not* the assailant. And they observed the attack from outside the restaurant, just steps away from the victim. Tr. 3/18/98 at 98-101, 141-142.

There were also weaknesses in the testimony of the Commonwealth's witness. Valeria Landaeta admitted that the attack lasted just seconds and that she saw it as a "flash" out "of the corner of [her] eye" as she was eating, Tr. 3/18/98 at 27; she acknowledged that she had identified Bustillo in part based on clothing color, *id.* at 28, 30. Witness Jesse Konstanty, a convicted felon, fingered Bustillo, but his testimony was substantially impeached.[3] And Michelle Gutierrez (Konstanty's girlfriend) also relied on clothing color for identification. Tr. 3/17/98 at 133, 170. All three witnesses, moreover, discussed with each other whom they thought they saw after the attack, raising the possibility that one's false recollection (particularly as to who was wearing what color before the attack) tainted the recollection and testimony of the others. *See also* p. 10, *supra* (Sirena's confession that he was wearing red). In the context of those sharply conflicting accounts and evenly divided testimony, the suppressed evidence—which places Sirena next to the victim with a cocked bat, and then near the crime scene with red stains on his shirt and pants, giving contradictory accounts of where he had been, and

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[3] Konstanty testified, for example, that he chased and fought Bustillo, punching Bustillo in the face. Tr. 3/17/98 at 222-23. There was unchallenged testimony, however, that Bustillo the next day showed no signs of having been involved in the scuffle. Tr. 3/18/98 at 118-19, 133-34.

lying about whether he had been at the Popeye's at all—is simply devastating.

B. The Circuit Court Misunderstood The Proper Standard For Evaluating Materiality Under *Brady*

In reaching the opposite result, the Circuit Court disregarded the standards established by this Court and the United States Supreme Court in three different ways.

1. The Circuit Court's first and most fundamental legal error was its attempt to reconcile all the evidence with a finding of guilt, rather than inquiring whether there is a "reasonable probability" that a single juror would have found a reasonable doubt as to whether Bustillo swung the fatal blow. A court reviewing the impact of improperly withheld *Brady* evidence must put itself in the shoes of the jurors who would have seen, heard, and *weighed* both the trial evidence and the additional exculpatory evidence (plus any resulting changes in strategy, cross-examination, etc.). But here the Circuit Court was concerned only with whether there was a way to square the jury's verdict with some of the newly discovered evidence, and, in so doing, simply discarded certain pieces of evidence in favor of others. Thus, although the *Brady* inquiry focuses on what *the jury (or, more accurately, at least one juror) might have believed*, the Circuit Court's analysis supplanted the jury's evaluative function with the judge's personal appraisal of whether the exculpatory evidence is somehow explainable.

For example, consider the Circuit Court's treatment of the blood at the crime scene, which was made highly relevant by the revelation that Sirena had red stains (thought by the officer to be ketchup) on his clothing during his encounter with Officer Mahoney on the night of the attack. Dr. Peter Bernad, "a neurologist who reviewed [the victim's] autopsy report and treatment records" before testifying at the April 2004 hearing on materiality, opined

that "blood would have 'sprayed/aerated' from the victim's ear at some point upon or almost immediately after impact." Opinion of May 4, 2004, at 5. Dr. Bernad also testified that "the blood would have had 'significant velocity' to . . . exit the ear." *Ibid.* At least three witnesses testified that the injury caused the victim to bleed at the scene, Tr. 3/17/98 at 133; Opinion of May 4, 2004, at 6, and the Circuit Court acknowledged there were "a few sizable drops of blood" in crime scene photos. *Id.* at 5. Even the Commonwealth's own witness, medical examiner Dr. Frances Field, testified at trial "that bleeding from the ear after being struck would not be unusual with the victim's type of injury." *Id.* at 5 n.26. But the Circuit Court set all this aside, stating that in its view the blood most likely "seeped" rather than "spattered" from the victim upon impact. Ironically, the Circuit Court dismissed Dr. Bernad's testimony that "blood may have aerated from the ear immediately upon impact" in large part because "he was not an expert on blood spatter." *Id.* at 5. Yet the Circuit Court apparently believed *it* had sufficient expertise to deem the "sizeable drops of blood" on the ground more consistent with "blood seepage" than "blood spatter," *id.* at 5, and to conclude that the suspicious red stains on Sirena's clothing would not have made a difference to one or more jurors.

In order to conclude that the Sirena police encounter was not material to the defense, the Circuit Court was forced to argue that no adverse inference should be drawn from the presence, just hours after the crime, of red stains on the clothing of an individual whom the government's own witnesses placed at the crime scene. Indeed, one could readily imagine the Commonwealth urging precisely the opposite in a trial of *Sirena*. Ultimately, the Circuit Court's conclusion rests on the incredible premise that red stains on the clothing of the person whom the defendant claims just

killed a man with a baseball bat is not important evidence.[1] The Circuit Court's labored effort to *explain away* the blood evidence, rather than to evaluate how a reasonable juror might have viewed it, is inconsistent with the legal duty under *Brady* to evaluate (not eliminate) the jury's possible deliberative processes.

The Circuit Court's analysis, moreover, entirely ignores perhaps the most damning aspects of the encounter—the facts that Sirena gave inconsistent stories about where he had been, lied about having been at the Popeye's, and was so shaken by his encounter with the police that he could not come up with his own address—all of which compellingly point to Sirena rather than Bustillo as the perpetrator. Given that evidence, it seems unlikely that the red stains were caused by a wayward hamburger that managed to assault both Sirena's shirt and pants. The direct and logical explanation is that Sirena was culpable—and that he lied to the police to avoid suspicion. As this Court has held, inconsistent statements like Sirena's are evidence "that he [was] trying to conceal his guilt." *Black*, 222 Va. at 841-842, 284 S.E.2d at 610; *Toler*, 188 Va. at 782, 51 S.E.2d at 214 ("untrue account of his whereabouts" raises "inferences of guilt"). But the Circuit Court's opinion is devoid of discus-

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[1] The Circuit Court even went so far as to suggest that the apparently low volume of blood at the crime scene and one witness's recollection that he did not see blood on Sirena's *shirt* undermined the materiality of the exculpatory evidence. May 4, 2004, Opinion at 5. To the contrary, those facts are entirely consistent with both the notion that whatever volume of blood exited the victim wound up on Sirena's person, and with Officer Mahoney's observation that most of the "ketchup" was on Sirena's *pants*. In any event, the materiality inquiry should not turn on whether or how much blood "seeped" or "spattered," because the Commonwealth's failure to turn over this exculpatory evidence prevented the defense from investigating that facet of the case and arguing it to the jury. Ultimately, it should have been up to the jurors to determine whether the blood evidence linked Sirena to the crime.

sion of those facts, in patent disregard of the duty to consider how *all* the evidence would have impacted the *jury*. *See Kyles*, 514 U.S. at 440-41 (criticizing court of appeals' *Brady* inquiry for "dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone").

2. The Circuit Court's second legal error was its failure to assess materiality in light of the divided eyewitness evidence at trial. Time and again this Court and the United States Supreme Court have emphasized that materiality must be determined in light of the weight and quality of the evidence presented to the jury at trial. In *United States v. Agurs*, for example, the court noted that, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 U.S. at 113; *see also Payne v. Commonwealth*, 220 Va. 601, 260 S.E.2d 247 (1979); *Brown v. Borg*, 951 F.2d 1011, 1017 (9th Cir. 1991); *Walker v. Lockhart*, 763 F.2d 942, 957 (8th Cir. 1985); *United States v. Herberman*, 583 F.2d 222, 228 (5th Cir. 1978). Consequently, where there is no physical evidence, no confession, and the critical eyewitness testimony is divided, even evidence that is not particularly weighty will be sufficient. That settled proposition notwithstanding, the Circuit Court here expressly refused to consider the weight of the evidence at trial, invoking the mantra that, "[o]n habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury." Opinion of May 4, 2004, at 9. With respect to *Brady* claims, however, precisely the opposite is true; the weight and credibility of the evidence before the jury is critical to materiality.

Moreover, the Circuit Court erred in asserting that the jurors could not acquit without "disregard[ing]" the eyewitness testimony of Michelle Gutierrez, Valeria Landaeta, and Jesse Konstanty, who claimed to have observed the evening attack from within the brightly-lighted Popeye's

dining room, partially obstructed by an advertising poster. Opinion of May 4, 2004, at 7 n.37. The jurors only would have needed a reasonable doubt as to whether that testimony (rather than that of the two other witnesses, who observed the attack from outside the restaurant, steps away from the victim) was mistaken. Ironically, moreover, the Circuit Court had no qualms about supplanting the jury's function when rejecting the testimony of Bustillo's witnesses. Opinion of May 4, 2004, at 6 (failing to find Quierola's testimony "persuasive[,] much less dispositive on any issue of materiality"); *id.* at 6-7 (rejecting Amaya's post-trial testimony in light of trial testimony that it considered "substantial" despite a purported refusal to weigh trial witness credibility). Under the proper legal framework, the court should not have been concerned with whether any witness's testimony was dispositive, but rather with whether the suppressed evidence was cumulatively sufficient—in a case with no physical evidence and divided eyewitness testimony—to meet the low threshold of establishing a "reasonable probability" of reasonable doubt in the mind of even a single juror. *Strickler v. Green*, 527 U.S. 263, 290 (1999); *Kyles*, 514 U.S. at 435.

3. The Circuit Court's third legal error was its decision to deem the testimony of Bustillo's trial counsel, David Bernhard, "instrumental" to the materiality analysis. After noting Bernhard's testimony that he was unsure whether the Mahoney report or Detective Cline's notes would have altered the outcome of trial, the Circuit Court applauded Bernhard's "commendable candor" and "the respect he enjoys from the Court," stating that these two factors, along with Bernhard's testimony itself, were "instrumental in addressing the fundamental issue presented." Opinion of May 4, 2004, at 9. That was error. The question here is the possible effect of the exculpatory evidence on the *jurors* given the evidence at trial—a function to be performed by the judge, not counsel. Indeed, Bustillo's habeas petition

included a claim of ineffective assistance against Bernhard, and Bustillo's leading argument on this point was that Bernhard failed to present sufficient exculpatory witnesses at trial. Habeas Pet. at 53. It is for this transparent reason that Bernhard testified, in the portion of the habeas transcript that the court found "instrumental," that he "made a 'strategic decision' not to call [several exculpatory witnesses] to testify." Opinion of May 4, 2004, at 8-9. Reliance on that sort of testimony rather than an objective evaluation of the evidence is inconsistent with *Brady*. *See Miller v. Angliker*, 848 F.2d 1312, 1321, 1323 (2d Cir. 1988) (noting that, where counsel is accused of ineffectiveness, it is error to rely on defense counsel's stated belief that the *Brady* evidence would not have changed the outcome instead of making "an objective evaluation of the likely impact that the withheld information would have had on typically competent counsel").

In any event, the Circuit Court misread Bernhard's testimony to answer the materiality question. Bernhard stated only that he was "not certain" what the result would have been. *Id.* at 8. To conclude that his testimony precludes a finding of materiality once again eschews the reasonable-probability standard, which permits a finding of materiality even in the face of significant doubt—let alone mere uncertainty—about whether the outcome of trial would have been different. *See, e.g., United States v. Bowie*, 198 F.3d 905, 908-09 (D.C. Cir. 1999) (explaining that the reasonable-probability test is anywhere between a 1% and 50% chance that the jury's verdict would have been different). If the court had engaged in the required analysis, it could not have found Bernhard's uncertainty to be "instrumental" to the *Brady* materiality issue.

II. The "Procedural Default" Rule Did Not Bar Consideration Of Bustillo's Vienna Convention Claim

The Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, guarantees that "consular officers shall be free to communicate with nationals of [their] State and to have access to them." *Id.* at Art. 36(2). When "a national of that State [is] arrested or committed to prison or to custody pending trial," authorities are required to advise "the consular post" of the arrested foreign national, and to "inform the person [arrested] without delay of his rights" under the Treaty. *Ibid.* There is no dispute that, in failing to inform Bustillo of his right to consult with consular officials (or to advise the Honduran Consulate of the arrest), the police violated Bustillo's rights under the Vienna Convention. That violation caused substantial prejudice, and the Circuit Court's failure to consider it is inconsistent with recent international precedent.[5]

A. International Precedent Prohibits "Procedural Default" From Blocking Judicial Consideration Of Article 36 Of The Vienna Convention

Because the United States is a signatory to the Vienna Convention, that Treaty is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the con-

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[5] Although Bustillo's attorney at trial was aware of his client's rights under the Vienna Convention, he chose neither to inform his client nor to raise the issue at trial. That failure to notify his client of his known rights by itself "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. It is akin to a defense counsel who knows that his client has a right to a jury trial, but unilaterally decides upon a bench trial. It is not within counsel's authority to summarily waive the right in that case, and likewise it is not within counsel's authority here. That deficiency, and the prejudice shown in Part II(B) below, satisfy both prongs of the test for a claim of ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

trary notwithstanding." U.S. Const. Art. VI, ¶ 2; *see United States v. Belmont*, 301 U.S. 324, 331-32 (1937). The International Court of Justice (ICJ) recently ruled in the *LaGrand* Case (*F.R.G. v. U.S.*) that the practice of barring Vienna Convention claims through the procedural default rule contravenes the terms of the Treaty. 2001 I.C.J. 104 (Judgment of June 28) (hereinafter *LaGrand*). The ICJ there held that "the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violated paragraph 2 of Article 36." *Id.* at ¶ 91. Following *LaGrand*, the ICJ reiterated that the Vienna Convention obligates signatories to consider violations through judicial processes notwithstanding asserted procedural bars. *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 128 (Judgment of March 31) (hereinafter *Avena*). The Vienna Convention, the ICJ declared, imposes an "obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." *Avena*, 2004 I.C.J. at ¶ 121.

The Circuit Court's holding that Bustillo procedurally defaulted his Vienna Convention claims is inconsistent with the Supremacy Clause and those decisions. Notably, both *LaGrand* and *Avena* were handed down several years after *Breard v. Greene*, 523 U.S. 371 (1998), the last case in which the United States Supreme Court discussed a Vienna Convention claim at any length. *Breard* states that courts "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Id.* at 375. The Circuit Court should have heeded that call.

B. The Vienna Convention Violation Resulted In Palpable Prejudice

The Vienna Convention violation prejudiced Bustillo's defense dramatically. Bustillo has attested that he did not know of his rights under the Convention and that he would have exercised those rights had he been advised properly. Habeas Pet. Exh. 14B (Aff. of Dec. 13, 2001). Here, exercise of those rights would have provided Bustillo with crucial information about Sirena, whom Bustillo has identified as the actual assailant. The Honduran Consulate has averred that it would have produced records of the Honduran National Register of Persons, including Sirena's fingerprints and photograph. Habeas Pet. Exh. 26b. Once presented with a photograph after trial, numerous witnesses identified Sirena as the assailant. *See, e.g.*, Habeas Pet., Exhs. 28, 33; p. 10, *supra*.

The Honduran Consulate, moreover, would have verified that Sirena entered Honduras on a flight the day after Merry died. Sirena's flight from the United States on the day after Merry's death is by itself powerful evidence, for the guilty "flee when no man pursueth." *California v. Hodari D.*, 499 U.S. 621, 624 n.1 (1991) (quoting Proverbs 28:1); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). It also would have directly foreclosed the very arguments the prosecution made at trial, including the suggestion that Sirena was a fiction, and its impeachment of Ulma Martinez, who saw Sirena on a flight to Honduras the day after Merry died. *See* Tr. 3/19/98, at 20-21. The prosecution claimed Martinez's testimony was not credible because "[s]he still doesn't know his full name"; noted that "[t]he plane tickets you have are for that witness, not for this Sirena"; and cast doubt as to whether the "so-called Sirena" "was on the plane" at all. *Id.* at 20-21. Yet Sirena *was* on that flight,

and the Government of Honduras *would have proved it* with incontrovertible immigration records.[6]

CONCLUSION

At the petition stage, it cannot be said that the Circuit Court's ruling below was plainly correct. It is, at the very least, reasonably probable that the exculpatory evidence improperly withheld in this case would have led one or more reasonable jurors to find reasonable doubt as to whether Bustillo or Sirena swung the fatal blow. The Circuit Court's resolution of the Vienna Convention issue, moreover, was erroneous. For the foregoing reasons, the petition for appeal should be granted.

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[6] That fact distinguishes this case from any of the Vienna Convention claims heard by this Court. *Bell v. Commonwealth*, 264 Va. 172, 188, 563 S.E.2d 695 (2002), for example, held that harmless error analysis applies and that no suppression remedy is available. In *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (1998), the defendant was arrested in the foreign country and was turned over to officials in that country before being brought to the United States. That case, moreover, also concerned an effort to suppress statements. In any event, neither case addresses the ICJ's recent *Avena* decision, which holds that courts must take cognizance of Article 36 violations where non-speculative prejudice is shown.

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 04-2023

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS APPEAL

Petitioner Mario Bustillo respectfully submits the following reply in opposition to Respondent's Conditionally Amended Motion to Dismiss the above-captioned appeal.

INTRODUCTION

This case arises out of the prosecution's failure to produce two pieces of exculpatory evidence supporting petitioner's defense at his first-degree murder trial, as well as a violation of his rights under the Vienna Convention on Consular Relations. Although petitioner's sole defense at trial was that another Honduran national, Sirena, swung the baseball bat that killed James Merry, prosecutors failed to disclose a police report revealing that an officer, while canvassing the area around the crime scene shortly after the attack, actually stopped the individual, Julio Osorto, now known to be "Sirena"; that the officer observed red

"ketchup" stains on Sirena's shirt and pants; that Sirena gave inconsistent accounts regarding his whereabouts; and that Sirena lied (according to the prosecution's own witnesses) about being at the crime scene when the attack occurred. In addition, prosecutors neglected to produce before trial a detective's interview notes confirming that Sirena was present during the attack and revealing that an eyewitness saw Sirena holding a "cocked" baseball bat shortly before the victim was struck.

More than four years after Bustillo's 1998 trial, the suppressed evidence was produced in the course of these habeas proceedings. The Circuit Court of Fairfax County determined that the prosecution had improperly withheld that exculpatory information. Ultimately, however, it concluded that the evidence was not "material." The Circuit Court issued two written opinions, making factual findings and articulating the purported basis for denying relief under *Brady v. Maryland*, 373 U.S. 83 (1963). The present petition for appeal followed.

Respondent now urges this Court to dismiss the petition for appeal in its entirety or, in the alternative, to strike the assignments of error relating to the *Brady* claims. Although respondent does not dispute that the transcripts of petitioner's trial are part of the record on appeal, respondent seeks to have the entire petition for appeal dismissed because the Circuit Court Clerk initially neglected to forward (but has since done so) the trial transcripts when it sent the rest of the record.[1] Respondent also urges the Court to dismiss the assignments of error related to the *Brady* claims because the transcripts of two hearings before the Circuit Court on habeas are not part of the record—even though all of the assignments of error relate to *legal errors* contained in the Circuit Court's opinions; even

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[1] It is undisputed that Petitioner was in no way responsible for the Circuit Court Clerk's failure to transmit the trial transcripts.

though those opinions include extensive factual findings regarding all issues relevant to the appeal; and even though the record includes all of the transcripts and exhibits of the 1998 trial, all of the wrongfully withheld exculpatory materials, and the parties' extensive pleadings and motions in the Circuit Court habeas proceedings. As explained below, respondent's motion to dismiss is meritless.

I. This Court's Rules Foreclose Dismissal Based On The Circuit Court Clerk's Initial Failure To Transmit The 1998 Trial Transcripts With The Rest Of The Record, And The Transcripts Are Now Properly Before This Court.

Respondent concedes that the transcripts of petitioner's 1998 criminal trial are part of the record in this case. *See* Motion to Dismiss at 4 n.2. Nonetheless, respondent urges the Court to dismiss the petition for appeal because, "for reasons that are not clear," the 1998 trial transcripts "were not forwarded to this Court." *Ibid.* That request is squarely foreclosed by this Court's Rules, which make it clear that the Circuit Court Clerk's failure to transmit the trial transcripts to this Court is *not* a basis for dismissal. "The failure of the clerk of the trial court to transmit the record as herein provided," Rule 5:13(c) declares, "shall not be a ground for dismissal of the appeal by this Court." The suggestion that the 1998 transcripts' temporary absence warrants dismissal of the appeal is thus wholly baseless.

The more appropriate course—given the Circuit Court Clerk's inadvertent failure to transmit the entire record as required by this Court's Rule—would have been to urge the Circuit Court Clerk to correct its mistake. For that reason, when the Commonwealth's counsel sought petitioner's consent to a proposed extension of time, the petitioner's counsel urged him to postpone filing the motion for a day to see if the Circuit Court Clerk could promptly rectify its error. Counsel for the Commonwealth declined to do so. In any event, counsel for petitioner has since contacted the Clerk;

the Clerk's office has advised that the entire record, including the transcripts of the 1998 trial, have now been transmitted to this Court; and we are advised that this Court has received those transcripts. Respondent then filed a motion on September 23, 2004, to conditionally withdraw its arguments based upon the 1998 transcripts if this Court determines the transcripts are properly before it.[2] To the extent the argument is not withdrawn, it should be rejected.

II. The Circuit Court Habeas Transcripts Are Not Necessary To This Court's Consideration Of The Circuit Court's Materiality Analysis Under *Brady*.

In the alternative, respondent urges the Court to dismiss some or all of the assignments of error relating to petitioner's *Brady* claims because two transcripts of hearings before the Circuit Court on habeas are not part of the record. This Court's Rule 5:11(b), however, provides that, if petitioner fails "to ensure that the record contains transcripts or a written statement of facts *necessary to permit resolution of appellate issues*, any assignments of error affected by the omission shall not be considered" (emphasis added). Respondent fails to demonstrate that the omitted transcripts would even be helpful, much less that they are "necessary" as required by Rule 5:11(b). To the contrary,

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[2] Although respondent's September 23, 2004, supplement purports to withdraw that part of the motion, it suggests that the 1998 trial transcripts *still* may not be properly before this Court, citing *Godfrey v. Commonwealth*, 227 Va. 460, 465, 317 S.E.2d 781, 784 (1984). That case is inapposite. *Godfrey* concerned an attempt to add material to the record on appeal *after* this Court had decided to hear the case. "After the record has been transmitted to this Court . . . *and an appeal has been granted*, the record on appeal cannot be enlarged except by our award of a writ of certiorari under Code § 8.01-673." *Id.* at 465, 784 (emphasis added). Here, by contrast, this Court has not yet acted on the petition for appeal. In any event, to the extent one is required, petitioner urges the Court to treat this brief as a conditional petition for such a writ.

as explained below, the transcripts are wholly unnecessary because the errors assigned in the Petition for Appeal are purely legal in nature—they address legal defects in the Circuit Court's reasoning and analysis that led it to an incorrect result. The only facts or evidence necessary to evaluate the petition are in the record, in the form of petitioner's original trial transcript and the improperly withheld evidence, as well as unchallenged factual findings by the Circuit Court.

A. Petitioner's Assignments Of Error Raise Legal Issues

Petitioner's Assignments of Error present legal questions that, by their very nature, are not dependent upon the testimony collected in the habeas proceedings. "[T]his Court will consider any question of law properly raised as to matters appearing on the face of the record." *Smyth v. Midgett*, 199 Va. 727, 729, 101 S.E.2d 575, 578 (1958); *see also ibid.* ("In this case the record consists of the pleadings, exhibits filed therewith and the orders of the lower court, which record is sufficient for the Court to pass on the questions of law raised by respondent."); *Salmon v. Commonwealth*, 32 Va. App. 586, 590, 529 S.E.2d 815, 817 (2000) (Where "the issue before [the court] is purely a question of law, . . . the hearing transcript is not indispensable to the resolution of the issue on appeal."). The errors assigned here do not purport to challenge the Circuit Court's factual findings. Rather, the appeal urges that the Circuit Court incorrectly held the exculpatory evidence to be immaterial (assignment of error 1) because of four additional legal errors: *first*, its erroneous effort to reconcile the suppressed exculpatory evidence with the trial verdict rather than to weigh that evidence's potential effect (assignment of error 2); *second*, its failure to consider the facts that the alternative suspect (Sirena) gave inconsistent statements about where he was coming from and falsely denied having been at the crime scene (assignment of error 3); *third*, its failure

to conduct its analysis of the suppressed evidence in light of divided eyewitness testimony at trial (assignment of error 4); and *fourth*, its erroneous decision to accord "instrumental" significance to trial counsel's opinion regarding the impact the exculpatory evidence might have had (assignment of error 5). *See* Petition for Appeal at 14. Those assignments address the method of the Circuit Court's analysis and its ultimate legal conclusion on materiality.

Accordingly, respondent flatly errs in suggesting, Motion to Dismiss at 3, that the absence of the transcripts of the habeas hearings somehow forecloses this appeal. The general rule that the facts are viewed in the light most favorable to the prevailing party makes no difference here, because the facts are not at issue; only the Circuit Court's legal analysis is. In any event, as discussed below, the Circuit Court in this case made specific findings of fact, and the transcripts of petitioner's 1998 criminal trial provide all the facts necessary for resolution of the appeal.

B. The Circuit Court's Opinion Contains Ample Facts To Permit Resolution Of The Appeal

To the extent resolution of these issues requires an understanding of the factual context in which they arise, the Circuit Court's factual findings—set forth in two different opinions—are more than sufficient to permit meaningful review. May 4, 2004, Opinion (unpublished); Sept. 16, 2003, Opinion (published in *Bustillo v. Johnson*, 63 Va. Cir. 125 (2003)). Virginia appellate courts regularly rely upon factual discussion contained in the lower court's opinion where a transcript is not available. *See, e.g., Carlton v. Paxton*, 14 Va. App. 105, 111-12, 415 S.E.2d 600, 603 (1992) ("The record here contains neither a transcript nor a written statement of facts; it does include the trial court's opinion letter of December 4, 1989, in which the court sets out in extensive detail the facts which, ultimately, stand as the basis for this appeal. This court may rely on this statement of the facts in this case.") (citing *Clark v.*

Commonwealth, 4 Va. App. 3, 4 n.1, 353 S.E.2d 790, 791 n.1 (1987)); *Goodpasture v. Goodpasture*, 7 Va. App. 55, 371 S.E.2d 845 (1988) ("The trial court's letter opinions . . . and order . . . sufficiently set forth the facts of the case. . . . Therefore, we deny [appellee's] motion to dismiss this appeal for failure to file a transcript."). Respondent's generalized complaint that the Circuit Court's opinion contains "characterization or summary of the testimony, not the actual testimony," Motion to Dismiss at 3, is thus an inadequate basis for dismissing the appeal.

Here, in any event, the Circuit Court's findings are sufficiently detailed to allow a thorough review of the assignments of error. That court's two opinions extensively describe the omitted evidence as well as the testimony of Dr. Peter Bernad, Yahayra Quierola, Amilcar Amaya, and David Bernhard, which the court considered in determining materiality. May 4, 2004, Opinion at 4-9. The Circuit Court not only recited the substance of those witnesses' testimony, but also explained its relevance to and impact upon the court's analysis. Those opinions, particularly in combination with the 1998 trial transcript, the *Brady* evidence itself, and the voluminous pleadings and exhibits in the record, constitute a more than adequate basis for deciding the issues presented here. That is especially true given that each and every one of the assignments of error is purely legal, challenging only the Circuit Court's reasoning and choice of legal standards, not its factual findings.[3]

Respondent's complaint that the Circuit Court's opinion is insufficient because it fails to discuss other witnesses'

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[3] If there is any doubt about whether the habeas transcripts are truly necessary to resolution of the materiality issue on appeal, it is important to note that courts routinely assess materiality *without* an evidentiary hearing, simply by evaluating the exculpatory evidence in light of the evidence at trial. *See, e.g., Robinson v. Commonwealth*, 231 Va. 142, 152, 341 S.E.2d 159, 165 (1986); *United States v. Ellis*, 121 F.3d 908, 915-18 (4th Cir. 1997).

testimony at the habeas hearings, Motion to Dismiss at 7, is likewise baseless. Respondent's motion fails to identify any omitted testimony it believes would be helpful—much less necessary—to resolve the assignments of error. Where, as here, the movant fails to provide an adequate basis justifying the relief it seeks in its initial moving papers, the motion must be denied.[4]

C. Respondent's Speculation About Potential Waivers Is Specious

Unwilling or unable to identify *any* evidence in the habeas proceedings transcripts necessary to resolve the purely legal issues raised in the petition for appeal, respondent suggests that, absent the transcripts, the record does not indicate whether petitioner properly raised and preserved the assignments of error. Motion to Dismiss at 3. Respondent's unsubstantiated speculation about possible waivers is without merit. With respect to assignment of error 1, respondent *concedes* that petitioner properly raised the materiality issue before the Circuit Court. Respondent, moreover, nowhere denies that the Circuit Court *actually resolved* the materiality issue on the merits in its 10-page opinion.

Nonetheless, respondent claims that petitioner's "assertions, made before the hearing, do not suffice to preserve the issue." Motion to Dismiss at 3. Respondent, however, cites no legal authority to support the claim that there can be a waiver of an issue actually pressed and passed upon by the Circuit Court. For one thing, the Circuit Court certainly found no waiver. It issued a lengthy opinion *directly addressing the materiality question*, confirming that the issue was very much alive before, during, and after the hearing. May 4, 2004, Opinion at 1 ("[T]his matter came

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[4] In any event, petitioner has expressly waived any objection should respondent wish to rely upon the omitted transcripts in the Court. Petition for Appeal at 3 n.1.

before the Court . . . for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence the Commonwealth of Virginia failed to disclose to the defense prior to the 1998 murder trial of Bustillo."); *id.* at 10 (concluding the evidence was not material). Respondent offers no reason to believe the Circuit Court somehow erred and nowhere suggests that the Commonwealth argued waiver before the Circuit Court. Having properly raised the issue, petitioner was not required to mindlessly repeat and restate its position that the suppressed evidence continued to be material as each bit of evidence was presented. In any event, it is settled law that a party, having raised the issue with sufficient clarity that the Circuit Court actually addresses it, is not required to burden the court by re-raising an issue time and again. Virginia Code § 8.01-384(A) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court."). Respondent's suggestion that the issue of materiality, pressed before the Circuit Court and addressed by it in a 10-page opinion, might be "waived" is thus meritless.

Respondent further claims that "the record fails to reveal *any* objection by the petitioner" with respect to assignments of error 2 through 5. Motion to Dismiss at 3. But those assignments of error do not relate to events occurring during a trial or a hearing where objections could be made. They identify *legal errors manifested for the first time in the Circuit Court's May 4, 2004, opinion.* Respondent cites no authority to support the absurd proposition that petitioner was obligated to clairvoyantly object to the legally flawed analysis that would be revealed in the Circuit Court's opinion. Nor does respondent attempt to explain how Petitioner could have foreseen that the Circuit Court's opinion would employ an incorrect legal analysis, flatly

ignore certain pieces of evidence, and erroneously accord "instrumental" significance to other testimony. *See* Virginia Code § 8.01-384(A) ("[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal."). At the time the trial court sent out its erroneous decision by letter, there were no more hearings to be held, no further proceedings to conduct, and no forum in which to object. And the law is clear that, once the Circuit Court issued its opinion containing the flawed analysis, petitioner was not obliged to return to the Circuit Court raising the errors through (yet another) motion for reconsideration. Virginia Code § 8.01-384(A).

In sum, the record amply demonstrates that petitioner raised and preserved each issue, and there is no credible basis for respondent's unsupported assertions of waiver.

CONCLUSION

In this case, Petitioner was sentenced to 30 years' imprisonment for a crime he did not commit. Petitioner respectfully submits that the rules should be construed to permit this Court to consider whether he was denied a fair trial by reason of the Commonwealth's unquestioned violation of its *Brady* obligation. Because this Court can analyze the necessary issues based on the record before it, respondent's motion to dismiss should be denied.

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 042023

MARIO A. BUSTILLO
Appellant

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Appellee

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR AN APPEAL (HABEAS) IN THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

After Bustillo was convicted, he discharged his attorney and hired new counsel. From that moment, his case metamorphosed from a thorough criminal defense into a crusade, in the courts and in the press, against the police and prosecutors who brought him to justice. All of the petitioner's original outlandish post trial and habeas claims of "police jury tampering, coaching of eyewitnesses, intimidation of witnesses causing some to perjure themselves and at least two others to remain silent," (H.R. 5), and ineffective assistance of counsel were found to be groundless and have been abandoned on appeal in their entirety.

What remains, aside from the legally meritless Vienna Convention claim, are Bustillo's arguments based on purportedly exculpatory information produced during habeas discovery. The trial court properly found—after extensive

briefing and two evidentiary hearings—that there was no reasonable likelihood these items would have produced a different outcome.

Finally, the petitioner devotes much of his brief to the argument that he is innocent. He claims that an individual nicknamed "Sirena" is the one really guilty of the murder of James Merry. He neglects to mention what Virginia courts have long held, that innocence is not at issue in a habeas corpus proceeding. *See, e.g., Virginia Parole Bd. v. Wilkins*, 255 Va. 419, 420-21, 498 S.E.2d 695, 696 (1998).

STATEMENT OF THE CASE

After a jury trial on March 17–20, 1998, Bustillo was found guilty of the murder of James Merry. Bustillo later filed a motion to set aside the verdict. (T.R. 150-168).[1] Following two evidentiary hearings, that motion was denied. The petitioner filed a renewed motion to set aside the verdict. (T.R. 209-14). That motion was denied without a hearing by letter dated October 7, 1998. (T.R. 234-39). By final order dated October 8, 1998, the Court imposed a sentence of 30 years on the charge of murder. (T.R. 203-04).

The petitioner unsuccessfully sought relief on appeal from the Court of Appeals of Virginia and this Court, Record No. 001110. The Supreme Court of the United States denied *certiorari* on June 4, 2001.

Bustillo then filed a petition for a writ of habeas corpus on January 13, 2002, in the Fairfax County Circuit Court. He alleged his Vienna Convention rights were violated, his attorney was ineffective in a number of particulars and the prosecution and police had engaged in numerous acts of misconduct. (H.R. 1-63). In one of his claims of prosecutorial misconduct, Bustillo asserted that the prosecution

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[1] The "T.R." abbreviation refers to the trial record, "H.R." to the habeas record. The Court should be aware that the exhibits to the habeas petition are, confusingly, filed in the record of the criminal trial, vol. 2. (T.R. 279-477).

possessed and withheld a photograph of "Sirena." (H.R. 39-40).

On May 3, 2002, the petitioner filed an "addendum" seeking to "augment" his habeas petition. He alleged that the Vienna Convention obligation was "absolute and non-delegable" but argued, in the alternative, that counsel was ineffective for failing to advise his client of his right to consult with the Honduran consulate. (H.R. 158). He later filed a motion for leave to amend his petition on this ground. (H.R. 254). The respondent objected on the ground that this amendment did not "relate back" to the original claims and was barred by the statute of limitations. (H.R. 272).

By order dated August 8, 2002, the circuit court ordered most of the habeas claims dismissed. (H.R. 285). The court dismissed the Vienna Convention claim based on *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974). The court also ordered an evidentiary hearing limited to the issue of when the Commonwealth came into possession of a photograph and a videotape of "Sirena." (H.R. 292-93).

The order did not address the "addendum" or requested amendment seeking to raise a claim of ineffective assistance of counsel for failing to inform Bustillo of his Vienna Convention rights. The respondent filed a motion for clarification, with an affidavit from trial counsel, asking the court to rule on this claim. (H.R. 310). Trial counsel explained in his affidavit that he was the son of a diplomat and was aware of the Vienna Convention. He deliberately did not advise his client of the Vienna Convention because he did not want his client to speak to anyone for fear that these conversations might be used against him at trial. (H.R. 318-19). The court entered an order amending the memorandum opinion on October 11, 2002, holding that the amendment was barred by the statute of limitations and, furthermore, had no merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). (H.R. 351).

Although Bustillo had not obtained the required leave of court to obtain discovery in a habeas case, Va. S. Ct. Rule 4:1(5)(3), he filed a motion to "compel" discovery. (H.R. 298). On October 3, 2002, the Court granted the requested discovery in part and denied it in part,[2] and ordered the respondent to produce by October 20, 2002, "the photograph of 'Sirena' a/k/a Julio Cesar Osorto Herrera . . . and any information possessed by the Fairfax Police Department pertaining to Sirena, a/k/a Julio Cesar Osorto Herrera." (H.R. 348).

The respondent produced several letters and exhibits in response to the discovery order, including a letter with exhibits dated October 10, 2002. (H.R. 365). One of these exhibits was a police report from Officer Mahoney dated December 10, 1997. The Mahoney report noted that "Osorto, Julio C." was stopped during a canvass of the area following the attack. The report notes that "Mr. Osorto has what appeared to be ketchup on his pant legs and a little on his shirt. He claimed he had come from McDonald's where he had eaten a cheeseburger . . . . He stated he lived at Chelsey Square Apts. but was confused on the address." He denied being present at the Popeye's. (H.R. 366-67).

Bustillo filed a motion for sanctions, complaining that some of the disclosures were insufficient in that they amounted to a description of the information rather than the actual notes from the detectives. (H.R. 356). On November 15, 2002, the court declined to award any sanctions and clarified its order and required the respondent to disclose, among other things, the notes from the lead detective. (H.R. 405).

Following an evidentiary hearing on December 5, 2002, the court denied habeas relief, holding that the Commonwealth had not violated the petitioner's right to obtain

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[2] The court declined to grant the petitioner's requested discovery of the personnel files of certain police officers.

Brady[3] material. (H.R. 454-58). On February 21, 2003, the court entered a final order to that effect. (H.R. 468-69). Even though Bustillo had been in possession of the Mahoney report since October 2002, he decided at that juncture to file a motion to reconsider and a motion for another evidentiary hearing, claiming that the report should have been disclosed by the prosecution at trial. (H.R. 481).[4] The Court overruled the respondent's objections and stayed its final order. (H.R. 471, 472-74). A month later, Bustillo filed a motion to amend his petition to include a new *Brady* claim for failure to disclose the police report.[5]

Bustillo filed a second motion to amend based on police notes of an interview with a gang member, Jose Armando Amaya (Canas). Although these notes are described in part in the memorandum opinion of the court, the actual notes are not a part of the habeas record as Bustillo never moved for their admission. (H.R. 483).

By letter opinion dated September 16, 2003, the court concluded that the information contained in the Mahoney report and the interview of Amaya Canas were exculpatory and should have been disclosed. Concerning the Mahoney report, the court noted, in hindsight, that the officers "*should have known*, given the contents of the investigative notes and the police report, that 'Sirena-Julio' and Julio Osorto *might be* one and the same person." (H.R. 486) (emphasis added). The court granted the motion for re-

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[3] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[4] The motion for reconsideration and the respondent's objections, for reasons that are not clear, are not a part of the record.

[5] The two motions to amend are also omitted from the habeas record. However, the respondent's objections to the amendments are included. (H.R. 472-77). Although the court held a hearing and issued a decision on these *Brady* claims, the record contains no ruling or order by the trial court specifically granting the motions to amend.

consideration and ordered a hearing to determine whether a reasonable probability existed that "had the evidence been disclosed to the defense, the result of the criminal trial might have been different." (H.R. 491).

Bustillo then filed a motion to preclude the respondent from adducing *any* evidence at the upcoming hearing. (H.R. 501). The court denied this motion. (H.R. 531-32). In addition, the circuit court ordered the file placed in protective seal in its entirety due to "unauthorized access to certain documents previously placed under seal by this Court." (H.R. 508). Later filings establish that the petitioner's counsel had improperly reviewed the sealed jury list and was seeking to contact jurors from Bustillo's criminal trial. (T.R. 89-91; H.R. 520-524).

Following an evidentiary hearing on April 7, 2004, the court issued a detailed memorandum opinion concluding that even if the evidence had been disclosed to the petitioner, there was no reasonable likelihood of a different outcome. (H.R. 558-70). This appeal, with the assistance of new counsel for the petitioner, followed.

ASSIGNMENTS OF ERROR

Bustillo assigns the following error:

1. The Circuit Court erred by denying Bustillo's petition for habeas corpus on the ground that the unlawfully withheld evidence was not material.
2. The Circuit Court erred by attempting to reconcile the belatedly produced exculpatory evidence with a guilty verdict, rather than attempting to assess the possible impact that evidence would have had upon a reasonable juror.
3. The Circuit Court erred by failing to address the impact of Sirena's inconsistent statements to Officer Mahoney on the night of the attack.

4. The Circuit Court erred when it failed to consider the impact of the wrongfully withheld evidence in light of the divided eyewitness testimony presented at trial.
5. The Circuit Court erred in affording "instrumental" significance to the self-serving testimony of trial counsel that he was "uncertain" of the impact that the wrongfully withheld evidence could have had on the jurors at trial.
6. The Circuit Court erred in holding that Bustillo's claim under Article 36 of the Vienna Convention on Consular Relations was procedurally barred.

STATEMENT OF FACTS

I. THE COMMONWEALTH'S CASE

On the evening of December 10, 1997, James Merry and three friends, Jesse Konstanty, Michelle Gutierrez and Valeria Landaeta, were inside a Popeye's restaurant, eating dinner. (Tr. 3/17/98 at 100, 102). Gutierrez looked out into the parking lot and saw three cars drive up, one parking in front of the other. The cars' occupants looked out of the windows and started pointing at them. Michelle warned her friends not to leave the restaurant because she thought something was going to happen. (Tr. 3/17/98 at 127). Michelle knew these men were members of the Commerce Street Locos, a gang. (Tr. 3/17/97 at 148).

Shortly thereafter, the men, around 15 of them, entered. Michelle knew the petitioner, Canecho, Sirena, Lisandro and Nick Parada and others, because she would often see them at the restaurant. (Tr. 3/17/98 at 128-29, 168). She also recognized Bustillo because she had seen him at Popeye's frequently the previous summer. (Tr. 3/17/98 at 129). The men were drunk, slurred their speech and threatened Merry and Jesse in Spanish, accusing them of fighting with members of their gang on another occasion. Michelle said they were mistaken, that neither Merry nor Konstanty were Hispanic or understood anything they were saying.

The group insisted, "no, it was him, it was him in the red car." (Tr. 3/17/98 at 128). She insisted in Spanish that they mistook him for someone else, because "he drives a blue car." The group looked at each other, after which the petitioner shook Merry's hand, and said, in Spanish, "Oh. I'm sorry. We got you mistaken." (Tr. 03/17/98 at 128). They said "We have no problems with you. It's your friend that we want to get an opportunity to meet." (Tr. 3/17/98 at 221). They left, and Michelle warned her friends to stay. (Tr. 03/17/98 at 130).

Nevertheless, Merry went outside to smoke a cigarette. As soon as he left, Michelle saw the others walking around the parking lot in pairs. (Tr. 3/17/98 at 157, 239-240). She then saw Merry lean against a sign and light up a cigarette. (Tr. 3/17/98 at 157). He appeared to be talking to Cristina Hondoy, who was facing him. (Tr. 3/17/98 at 163, 250). An assailant ran up, swung a baseball bat, hit Merry on the left side of his head and ran away. (Tr. 3/17/98 at 131, 181).

The blow fractured Merry's skull in several places. (Tr. 3/17/98 205). Dr. Frances Field, the medical examiner who examined Merry, testified that such an injury would cause blood to "seep" into the inner ear and then out of the ear canal. (Tr. 3/17/98 at 193). Following the attack, Merry's brain continued to swell, shutting down his other organs, and he died six days later after life supports were discontinued. (Tr. 3/17/98 at 207).

The police soon arrived and questioned a number of individuals. That night police also recovered two baseball bats at the scene, 50 to 75 yards east of the Popeye's. (Tr. 3/17/98 at 116). Neither bat had blood on it. (Tr. 3/17/98 at 108). Mario Bustillo was the only perpetrator identified to the police; not a *single* eyewitness told the police that "Sirena" struck the fatal blow. (Tr. 03/18/98 at 53, 67-68, 69).

At the time of trial, police did not know Sirena's identity. (Tr. 03/18/98 at 70). He was referred to by one witness as having a first name "Julio." Police spoke with several individuals but no one could provide them with a last name or any information about Sirena. (Tr. 03/08/98 at 70).[6]

Both Michelle and Jesse, separately and without hesitation, picked the petitioner's photo from a photo spread Detective Cline showed them. (Tr. 3/18/98 at 39, 41-42). They testified at trial that Bustillo was the assailant. (Tr. 3/17/98 at 131, 138). Valeria Landaeta also identified Bustillo as the assailant. (Tr. 3/18/98 at 21-22, 28). She went to the same school as Bustillo, where she would see him every day because she shared a class with him. (Tr. 3/18/98 at 20-21). Landaeta knew that he lived approximately five minutes from Popeye's, and she, Michelle, and another friend told the police where he lived. (Tr. 3/18/98 at 22-23, 43).

Detective Cline noted that the lighting outside the restaurant was very good, and despite a small amount of glare, he could still clearly see the facial features and clothing of a person in the parking lot without any difficulty. (Tr. 3/18/98 at 44-45).

II. THE PETITIONER'S SIRENA THEORY

At trial, Bustillo claimed that a gang member named "Sirena" was responsible for the attack. He adduced testimony from Amilcar Amaya, who said he observed "Señor Julio," a/k/a Sirena, walk towards the area where Merry was standing. When he was close, he moved to the right, took out a bat and hit Merry on the side of the head. (Tr. 3/18/98 at 98-100, 110). Amaya testified that he did not see the petitioner there that evening at all, either inside or outside the restaurant, and stated that he was the one who

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[6] Sirena is referred to variously as Julio Sorto, (Tr. 03/18/98 at 70); Ostorto, Julio (H.R. 402-03), Osorto, Julio C., (H.R. 366-67) and Julio Cesar Osorto Herrera, (T.R. 381, 390).

shook hands with Merry inside the restaurant. (Tr. 3/18/98 at 101).

Johnny Sejas testified that the night of December 10, between 8:00 and 9:00 p.m., he saw Bustillo drive his father's truck into the parking lot at 7209 Lockport Place in Lorton, Virginia. (Tr. 3/18/98 at 173-176). Ulma Martinez said she noticed Sirena, on December 17, 1997, on a flight bound for Honduras. (Tr. 3/18/98 at 167-169).

III. POST-TRIAL MOTIONS

Bustillo filed a motion to set aside the jury's verdict. (T.R. 150-161). He supplemented this motion with an addendum. (T.R. 162-168). In that motion, he alleged 1) insufficient evidence, 2) newly discovered evidence through "new" witnesses (Giovany Hernandez, Marvin Escobar and Jose Maldonado), and "false trial testimony" (Valeria Landaeta), 3) "illegally obtained evidence" in the form of alleged threats by Detective Cline to Nicholas Parada, and 4) a *Brady* violation, for the alleged nondisclosure of an allegedly exculpatory statement from Yahayra Quierolo.

The court held a hearing on the motion. Among other witnesses, Valeria Landaeta testified to the extensive pressure placed on her by a gang member to recant her testimony. (Tr. 7/13/98 at 180-182, 211). The court denied the motion, finding *inter alia* the allegations of police misconduct not credible. (Tr. 07/13/98 at 246-269).

Bustillo filed a renewed motion to set aside the verdict, claiming still more newly discovered evidence and further allegations of police misconduct. (T.R. 209-14). The court again denied the motion. (T.R. 234-39).

ARGUMENT

I. ASSIGNMENTS OF ERROR 1 THROUGH 5 ARE BARRED FROM APPELLATE REVIEW.

This Court has ruled that the transcripts were not timely filed. Accordingly, the issues for which the transcripts are

necessary cannot be reviewed on appeal. *Towler v. Commonwealth*, 216 Va. 533, 534, 221 S.E.2d 119, 121 (1976). Bustillo says in a footnote of the introductory statement of his petition for appeal that "the transcripts . . . are not necessary to resolve the questions presented by this case." (Pet. at 3, n. 1). The respondent disagrees.

It is impossible to achieve elementary functions of appellate review without the transcripts. First, this Court cannot, without the transcripts, view the totality of the evidence in the light most favorable to the prevailing party. *See Burns v. Commonwealth*, 261 Va. 307, 313, 541 S.E.2d 872, 877 (2001). In addition, the transcripts would reveal whether the petitioner preserved any of the issues raised on appeal and made the specific arguments now advanced. *See* Rule 5:25.

Attempting to circumvent the lack of transcripts, the petitioner cites liberally to the factual discussion contained in the memorandum opinion of the trial court. However, that opinion represents the court's characterization or summary of the testimony, not the actual testimony. Among other things, the memorandum opinion does not discuss at all the testimony of the many witnesses presented by the respondent.

In his reply to the motion to dismiss these assignments of error, Bustillo claims that the transcripts are unnecessary because the errors assigned in the petition for appeal are "purely legal in nature." However, the legal argument, particularly on *Brady* issues, cannot be abstracted from the detailed facts of the case. Indeed, Bustillo's extensive factual discussion in his own petition betrays the lack of merit of this argument.

In the same reply, Bustillo also cites four cases from the Court of Appeals of Virginia in support of his argument that a memorandum opinion by a trial court excuses the need for a transcript. It is telling that the petitioner cannot locate a

single decision from *this Court* in support of this assertion. The cases from the Court of Appeals represent, at best, non-binding persuasive authority. Furthermore, those cases did not involve an assertion by the appellee, as in this case, that many, if not most, of the specific arguments on appeal were not made at trial and hence are procedurally defaulted.

Finally, the transcripts would have presented critical evidence in support of the respondent's contention that there was no blood "spatter"—as opposed to blood seepage—at the scene and that the stains on "Sirena's" clothes were not blood. At the hearing, the respondent adduced evidence from the medical examiner who performed the autopsy on the victim; three firefighters who were at the crime scene and one police officer, all of whom testified to the lack of blood spatter. Finally, one of the officers who detained Sirena on the night of the attack testified about his observations of the red "stains" on Sirena. Due to the absence of transcripts, this Court cannot review this evidence.

For these reasons, the respondent renews his motion, held in abeyance by this Court, that assignments of error 1-5 be dismissed.

II. THE TRIAL COURT PROPERLY CONCLUDED AFTER TWO EVIDENTIARY HEARINGS THAT THE PETITIONER'S *BRADY* CLAIMS DID NOT WARRANT HABEAS RELIEF.

Without waiving the argument above concerning the necessity of the transcript, and given the posture of the case, the respondent will address the petitioner's *Brady* arguments based on the memorandum opinion of the trial court.

A. Standard of review.

On appeal, this Court will defer to a circuit court's factual findings and is bound by them unless they are plainly wrong or without legal support. Questions of law,

however, are reviewed *de novo*. *See Lovitt v. Warden*, 266 Va. 216, 229, 585 S.E.2d 801, 808 (2003) (citation omitted) (reviewing capital case under Va. Code § 8.01-654(C)).

B. Standard of review for non-disclosure of exculpatory evidence.

> [A] due process violation occurs when the prosecution suppresses evidence favorable to an accused that is material either to guilt or to punishment, irrespective whether the prosecution acted in good faith or bad faith . . . .
>
> Exculpatory evidence is material if there is a reasonable probability that the proceeding would have resulted in a different outcome had the evidence been disclosed to the defense . . . . A "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceeding . . . . At the heart of this inquiry is a determination whether the evidence favorable to the defendant could reasonably be considered as placing the entire case in such a different light that confidence in the verdict is undermined.

Lovitt, 266 Va. at 244, 585 S.E.2d at 817 (citations omitted).

C. The Mahoney report creates no reasonable likelihood of a different outcome.

1. The ketchup stains.

To establish the materiality of what Bustillo calls the "red stains" indicated on the Mahoney report, Bustillo had to show that (1) the wound sustained by the victim caused a rapid spray of blood and (2) that the bleeding likely landed on the assailant so as to explain the "red" stains. The trial evidence was uncontested that the assailant struck a single blow to the left *side* of Merry's head, followed by immediate flight. This circumstance alone makes it extremely improbable for any blood to immediately spurt out of the victim's ear and land on the assailant. Furthermore, no blood was found on the bats. It is inconceivable that blood would

spray out and land all over the assailant without landing on the bats themselves. Moreover, common experience shows that ketchup stains retain their vivid red color, whereas blood stains rapidly darken. The petitioner repeatedly describes the stains as "red" while ignoring the notation in the Mahoney report that Osorto had what appeared to be "ketchup" on his clothes.

The trial court made factual findings consistent with the crime scene photographs, and the medical and non-medical evidence that the blood found at the scene was from seepage and not from "spray" or "spatter." (H.R. 562). The court was certainly not required to credit the petitioner's medical expert, Dr. Bernad. Second, the trial court specifically, and very logically given their many contradictions, found that the testimony of Amilcar Amaya and Queirolo, who claimed to have observed blood spray land on Sirena, was not credible. (H.R. 563). All of these facts would have been as obvious to a jury as they were to the trial court.

2. Sirena's statements.

Bustillo emphasizes the contradictory and inculpatory nature of Sirena's statements concerning his whereabouts, as memorialized in Officer Mahoney's report. (Pet. at 21-22). First, the reviewable record does not show that this argument was made at trial. Therefore, it is barred by Rule 5:25. Second, Bustillo does not explain how these hearsay statements by Sirena would have been admissible. This Court has held that "[e]vidence that is inadmissible at trial is not 'evidence' at all, for *Brady* purposes . . . . Thus, it is not 'reasonably likely' that disclosure of such information would result in a different outcome at trial." *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 518 (1998). Even if the statements could be admitted, it would hardly be surprising that a gang member who had just been present at the scene of a vicious attack would deny his presence at the scene.

3. Other arguments.

Bustillo also asserts that had he possessed the Mahoney report, he would have obtained a photograph of Sirena and obtained a videotape of a purported confession from him. (Pet. at 23-24). These arguments were never made in the trial court. Therefore, they are barred under Rule 5:25. In addition, the argument concerning the photograph is without merit for the reasons articulated below in response to the Vienna Convention argument. Bustillo further says that, had he known of this report, he *might* have withdrawn his alibi defense. (Pet. at 24). Again, this argument was not made at trial, Rule 5:25, and is based on sheer speculation. He also says he would have confirmed Sirena's existence. Again, the reviewable record does not show this argument was made below. Therefore, it is likewise barred. Rule 5:25.

D. Detective Cline's notes of his meeting with Amaya create no reasonable likelihood of a different outcome.

As noted above, this note from Detective Cline does not appear to have been moved into evidence and is not contained in the trial record. However, it is described in the memorandum opinion. (H.R. 559, n. 6). Prior to Bustillo's criminal trial, the Commonwealth disclosed in discovery, that

> Jose Armando Amaya told law enforcement that he saw the defendant and Sirena at the scene and both had bats. They approached the victim with Sirena behind the defendant. His view was obstructed by a brick pillar and he couldn't tell which one struck the victim.

(T.R. 17). The petitioner says the Commonwealth should have further disclosed the fact that the notes contain a notation that he observed Sirena with a "bat cocked," running toward the petitioner. The trial court sensibly found those notes would have made no difference.

First, Detective Cline's notes would not have made a difference because trial counsel would not have called Amaya a/k/a Canas as a witness. (H.R. 566). The trial court commended counsel on his testimonial candor in that regard. (H.R. 566). Therefore, the notes could not have had any impact on the case.

Second, Amaya Canas said that Sirena was running *behind* Bustillo. For a defense that relied on an alibi, placing the petitioner at the scene, bat in hand, running ahead of Sirena, would have proved devastating. This is particularly so because Amaya Canas was a member of Bustillo's gang. (T.R. 288). Indeed, it would have, at a minimum, established Bustillo's guilt as a principal in the second degree, punishable to the same extent as a principal in the first degree. *See Mochring v. Commonwealth*, 223 Va. 564, 567, 290 S.E.2d 891, 892 (1982) ("A principal in the second degree is one who is not only present at a crime's commission, but one who also commits some overt act, such as inciting, encouraging, advising, or assisting in the commission of the crime or shares the perpetrator's criminal intent."). "[A] principal in the second degree may be indicted, tried, convicted, and punished in all respects as if a principal in the first degree." *Taylor v. Commonwealth*, 260 Va. 683, 687-688, 537 S.E.2d 592, 594 (2000) (citing Code § 18.2-18). The small gain of placing Sirena at the scene would have been more than outweighed by the extremely damaging aspect of Amaya's testimony.

E. The trial court cited and applied the correct standard.

First, the petitioner takes no issue with the legal standard set forth by the trial court in assessing *Brady* material. Rather, he challenges the trial court's application of the standard. A review of the memorandum opinion shows that the trial court carefully weighed the evidence in its totality, including Dr. Bernad's internally inconsistent opinion and the testimony of trial counsel, in reaching its

conclusion. These factual conclusions are entitled to deference on appeal. *Lovitt*, 266 Va. at 229, 585 S.E.2d at 808. Further, it is impossible to assess the trial court's weighing of the evidence, including trial counsel's testimony and Dr. Bernad's testimony, without the transcripts of the habeas hearing. Finally, the *Brady* standard is a *reasonable* probability of a different outcome, not *any remote possibility* a juror would have reached a different conclusion. The petitioner's evidence, when subjected to proper scrutiny, utterly failed to meet the materiality standard.

III. THE TRIAL COURT PROPERLY HELD THE VIENNA CONVENTION ISSUE DEFAULTED.

The Vienna Convention is a 79-article multinational treaty. Under Article 36, the treaty requires an arresting government to notify a foreign national of his right to contact his consul. Vienna Convention on Consular Relations and Optional Protocol on Disputes (Vienna Convention), 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963).

A. The Vienna Convention creates no individual rights.

Bustillo argues that his Vienna Convention rights were violated. This Court held in *Kasi v. Commonwealth*, 256 Va. 407, 419, 508 S.E.2d 57, 64 (1998) that the provisions of the Vienna Convention on Consular Relations create no legally enforceable individual rights. *See also Shackleford v. Commonwealth*, 262 Va. 196, 197, 547 S.E.2d 899, 905 (2001). The recent decision by the International Court of Justice *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 128 (March 31) (hereafter *Avena*), a dispute between two sovereign nations, does not change this fact. Accordingly, Bustillo cannot raise this issue.

B. The issues are defaulted.

Bustillo argues that state rules of procedural default and timeliness are inapplicable to the litigation of Vienna Con-

vention claims. Most tellingly, the petitioner does not cite ***any*** federal or state case in support of this argument. The only case on point found by the respondent decided after the *Avena* decision is *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). In *Medellin*, the Fifth Circuit Court of Appeals held that the petitioner's challenge to his state convictions based on the Vienna Convention was procedurally defaulted and also failed because the Vienna Convention did not create any individually enforceable rights. *Id.* at 279-80.

It is also well established in Virginia that a habeas petitioner defaults issues of federal constitutional law if they are not properly or timely presented. *See, e.g., Mueller v. Murray*, 252 Va. 356, 367, 478 S.E.2d 542, 549 (1996) (Eighth Amendment claim barred by *Slayton v. Parrigan*). If issues of constitutional moment can be defaulted, it is difficult to see why a treaty, which is itself subordinate to the federal constitution, should escape from this rule.

Second, this view would lead to absurd results. If Bustillo's argument were accepted, such claims could be raised at any time—including decades after the termination of trial and direct appeal proceedings. Likewise, the successive petition bar of Virginia Code § 8.01-654(B)(2) would not apply. Consequently, under Bustillo's view, a habeas petitioner could file a weekly Vienna Convention petition and state courts would be required to adjudicate it. Nor would a petitioner who had fully litigated such a claim be precluded by "subordinate" state rules of *res judicata* or collateral estoppel from raising the claim anew.

Bustillo's reliance on the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27), is misplaced. This Court examined that decision in *Bell v. Commonwealth*, 264 Va. 172, 187-88, 563 S.E.2d 695, 706 (2002), and held that "the ICJ, contrary to Bell's assertion, did not hold that Article 36 of the Vienna Convention creates legally enforceable individual rights that a defendant may assert in a state criminal

proceeding to reverse a conviction." If that is true on direct appeal, it is at least equally so on collateral review.

C. The constitutional standard of effective assistance of counsel precludes relief.

The petitioner faces an additional hurdle in this case. His trial counsel—who was raised in diplomatic circles—stated that he purposefully did not advise his client of his Vienna Convention rights. He feared that if the petitioner spoke with a consular official, these statements could prove harmful because diplomats are wont to talk. (H.R. 314-15). The trial court credited this statement and further held the claim of ineffective assistance of counsel was without merit under *Strickland v. Washington*. (H.R. 351). The tactical decision by counsel vitiates any claim of prejudice caused by any failure of the state to notify Bustillo of his rights under the Convention.

On appeal, Bustillo argues for the first time that the failure by counsel to advise his client of his Vienna Convention rights constituted *per se* ineffective assistance. (Pet. at 32, n. 5). This argument was never made to the trial court and is barred by Rule 5:25. Nor is it the subject of an assignment of error. Therefore, this Court should not reach the issue.

Furthermore, Bustillo cites no authority to support his assertion that trial counsel is *per se* ineffective if he does not advise his client of his rights under the Vienna Convention. He attempts to analogize the Vienna Convention rights to the fundamental right to a jury trial, which counsel may not unilaterally waive. (Pet. at 32, n. 5). However, a petitioner's rights under the Vienna Convention are not analogous to the centuries-old right to a jury trial. This Court, examining a different fundamental right, has noted that "[t]he language of Article 36 does not create a fundamental right comparable to the privilege against self-incrimination." *Bell*, 264 Va. at 189, 563 S.E.2d at 707.

Moreover, in the *Avena* decision, Mexico argued that "the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings . . . ." *Avena*, 2004 I.C.J. at ¶ 124. The International Court of Justice held that this was

> not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that Mexico draws from its contention in that regard.

Id.

Counsel's tactical decision, based on his own experience in diplomatic circles, and to which the deferential *Strickland* standard of review applies, was eminently reasonable. The ***constitutional*** standard of review of counsel's performance articulated in *Strickland* cannot be subordinate to a treaty.

D. The petitioner can show no prejudice.

1. The photograph

Bustillo asserts that had the Honduran authorities been alerted, they could have obtained confirmation of Sirena's identity and produced a photograph. Bustillo claims that "once presented with a photograph after trial, numerous witnesses identified Sirena as the assailant." (Pet. at 33). In fact, the photograph would not have made any difference because the proffered testimony in the affidavits attached to the habeas petition is utterly unworthy of belief by any sentient factfinder.

The petitioner contends that "numerous witnesses" can now identify Sirena from the photograph. These witnesses consist chiefly of a parade of obviously biased gang members: Amilcar Amaya, Lisandro Parada, Marvin Escobar and Godofredo Jimenez. (T.R. 465, Tr. 03/18/98 at 90-91; Tr. 07/13/98 at 39, 54). All of these "witnesses" have pro-

vided conflicting accounts and have shown what could be charitably described as a remarkable flexibility in their recollection. This flexibility would have been obvious to any fact-finder.

When interviewed by trial counsel, Escobar—who had known Sirena for three years and Bustillo for one year—said he did not know who struck the blow. (Tr. 07/13/98 at 94-95). By the time of the post-trial motion to reconsider, he was sure it was Sirena. (Tr. 07/13/98 at 43). Following the April 4, 2004, hearing, the trial court specifically found Amilcar Amaya's testimony was not credible and specifically noted his inconsistencies. (H.R. 563). Jimenez, contrary to his current version, told the police that Bustillo was present—undermining Bustillo's alibi—and he did not see who committed the assault. (T.R. 229).

Claudia Tafur, Esmirna Christina Hondoy and Yahayra Queirolo also provided affidavits in support of the habeas petition and each also identified Sirena from the photograph as the assailant. (T.R. 285, 388, 392, 497). Although they are not gang members, their testimony is so vacillating and implausible that it verges on self-parody.

Tafur said on the evening of the attack, December 10, 1997, that Bustillo was the assailant. (T.R. 285). Tafur knew Sirena because she previously ***dated him*** and she went to school with Bustillo. (T.R. 388). A year and a half later, on June 16, 1999, she had come to understand that she "did not see enough of the assailant's face to be able to accurately concluse [sic] who it was." (T.R. 285). By December 18, 2001, ***four years*** after the attack, her memory had improved to the point where she now knew that Sirena was really the assailant. (T.R. 388).

Hondoy noted in her habeas affidavit that the photograph of Julio Osorto Herrera "resembles the person who struck Merry." (T.R. 392). However, she told the police the day after the attack that she knew Bustillo and that she saw

him strike Merry with the bat. (Tr. 03/18/98 at 188-190; T.R. 180). Following the attack, she obtained money from the petitioner's father. (Tr. 03/18/98 at 149-50). By the time of trial, she was sure Bustillo was not the assailant. (Tr. 03/18/98 at 142-43). At that point, she had "no idea who the person is" that attacked Merry. (Tr. 03/18/98 at 142-43). She also could not recall whether she told the police she knew Bustillo. (Tr. 03/18/98 at 157).

Queirolo told Detective Cline that she saw Bustillo swing the bat, but did not see the actual impact. (T.R. 179). She said she had known Bustillo for a year, and had seen him at "parties and stuff." (Trial exhibits, Def. Exh. I; Tr. 06/17/98 at 12; T.R. 467). Queirolo said she knew Sirena because one of her friends used to date him. (T.R. 467). Several weeks before trial, she became unsure, but she said the assailant "could be" Bustillo. (Tr. 06/17/98 at 13-14). Three and a half years later, on August 1, 2001, she became convinced the attacker was Sirena. (T.R. 467).

Given these circumstances, there is no reasonable probability that any reasonable fact-finder would credit such inconsistent testimony. Indeed, it would likely *strengthen* the fact-finder's conclusion that Bustillo was guilty. The trial court made this observation at the hearing on the motion to reconsider the verdict, noting that adducing testimony from such witnesses "if anything, it may have produced a more harsh result . . . ." (Tr. 07/13/98 at 260-61).

Moreover, these witnesses were all known to trial counsel, who made a tactical decision not to call them. (H.R. 242-46; Tr. 06/17/98 at 14; Tr. 07/13/98 at 92-93, 102). Since the witnesses were purposefully not called at trial, Bustillo's claim of prejudice evaporates.

In addition, Bustillo obtained a photograph of Sirena nearly three months before the trial court entered its final order. (Tr. 07/13/98 at 143-45; T.R. 244). If he wanted to test the recollection of the Commonwealth's witnesses with

that photograph, he certainly had the opportunity to do so before final judgment. He did so with Queirolo in a post-trial hearing. (Tr. 06/17/98 at 10). Instead, he chose to forego the opportunity.

Finally, since the vast majority of these witnesses knew Sirena, some of them over a period of *years*, many shared membership in the Commerce Street Locos gang, or even *dated* him, it is difficult to comprehend why a photograph was so necessary for an identification.

2. Confirmation of Sirena's flight.

Bustillo also argues that the Honduran consulate would have provided confirmation that Sirena was on the flight to Honduras, in support of the testimony provided by Ulma Martinez. (Tr. 03/18/99 at 167-68). He then argues that this constitutes "powerful evidence, for the guilty 'flee when no man pursueth.'" (Pet. at 34) (citation omitted).[7]

This argument is unpersuasive. If Sirena was not only present at the crime scene but also running behind the petitioner, bat in hand, toward the victim, he was guilty as a principal in the second degree. *See Moehring*, 223 Va. at 567, 290 S.E.2d at 892; *Taylor*, 260 Va. at 687-688, 537 S.E.2d at 594. The police had stopped and questioned Julio Osorto on the night of the attack. Therefore, assuming Osorto and Sirena are one and the same, he had a compelling motive to flee—regardless of the petitioner's guilt. Further minimizing any prejudice along these lines and in addition to Martinez' testimony, Detective Cline confirmed that Sirena could not be found in the weeks following the attack. (Tr. 03/18/98 at 70-71). Amaya also said he had not seen Sirena since the assault. (Tr. 03/18/98 at 101-02). Finally, this tangential information, a photograph and confirmation of the flight, do not alter the fundamental evidence against the petitioner: three eyewitnesses, two of

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[7] A more apposite Biblical text for this case would be Exodus 20:13: "Thou shalt not kill."

whom knew Bustillo, identified him in good light as the assailant.

CONCLUSION

This Court should deny the petition for appeal and should further dismiss assignments of error 1-5.

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 042023
CIRCUIT COURT NO. L201879

MARIO A. BUSTILLO,
APPELLANT,

AGAINST

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
APPELLEE.

Monday, March 7, 2005

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law with regard to assignments of error nos. 1 through 5 because the appellant failed to file the habeas proceeding transcript(s), the Court dismisses the petition for appeal as to those assignments of error.

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of with regard to assignment of error no. 6. Accordingly, the Court refuses the petition for appeal as to that assignment of error.

Chief Justice Hassell took no part in the decision of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

/s/

Deputy Clerk

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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No. 05-51

Nov. 7, 2005

Motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari to the Supreme Court of Oregon in No. 04-10566 granted limited to Questions 1 and 2 presented by the petition. Petition for writ of certiorari to the Supreme Court of Virginia in No. 05-51 granted limited to Question 1 presented by the petition. These cases are consolidated and a total of one hour is allotted for oral argument.

(13)
No. 05-51

Supreme Court, U.S.
FILED
DEC 23 2005
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IN THE

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MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF FOR PETITIONER MARIO A. BUSTILLO

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QUESTION PRESENTED

Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or on the ground that the treaty does not create individually enforceable rights.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the case in the Supreme Court of Virginia are named in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceedings Below	ii
Opinions Below	1
Jurisdiction	1
Constitutional And Treaty Provisions Involved	1
Statement	1
I. Treaty Background	3
II. Proceedings In This Case	4
A. The Murder Of James Merry	4
B. The Trial And Direct Review	6
C. State Habeas Proceedings	9
Summary Of Argument	12
Argument	16
I. Article 36 Of The Vienna Convention Creates Individual Rights That Are Judicially Enforceable	16
A. The Supremacy Clause Makes Treaties, Including The Vienna Convention, Binding And Enforceable Federal Law	16
B. Article 36 Of The Vienna Convention Creates Individual Rights	20
1. The Text Of Article 36 Unambiguously Defines The Rights Of Individuals	21
2. The *Travaux Préparatoires* Confirm That Article 36 Creates Individual Rights	24

TABLE OF CONTENTS—Continued

Page

3. The United States' Post-Ratification Conduct Shows That Article 36 Creates Individual Rights 27

4. Post-Ratification Conduct Of Other Signatories And International Judicial Bodies Confirms That Article 36 Confers Individual Rights 29

5. The Preamble To The Vienna Convention Does Not Contradict Article 36's Clear Text 31

II. The Asserted State Procedural Bar Cannot Preclude Consideration Of Bustillo's Otherwise Valid Claim For Enforcement Of Article 36 34

A. Where The Violation Prevents Presentation Of Exculpatory Evidence, Procedural Bars Contravene Article 36's Requirement That Local Law Give "Full Effect" To Treaty Rights 34

B. The Asserted Procedural Bar Makes It Impossible To Give "Full Effect" To Article 36 Claims Where, Absent The Violation, The Consulate Could Have Provided Exculpatory Evidence 39

C. The Procedural Bar Also Prejudices The Truth-Finding Capacity Of The Criminal Justice System 45

Conclusion 50

Appendix A – (constitutional and treaty provisions) 1a

Appendix B – (signatories to the Vienna Convention) 5a

TABLE OF AUTHORITIES

Page

CASES

Air France v. *Saks*, 470 U.S. 392 (1985)..... 21, 27, 29

Alaska v. *United States*, 125 S. Ct. 2137 (2005)..... 27

Asakura v. *Seattle*, 265 U.S. 332 (1924)..... 18, 21

Bacardi Corp. v. *Domentech*, 311 U.S. 150 (1940)..... 19, 34

Bhd. of R.R. Trainmen v. *Baltimore & O.R. Co.*, 331 U.S. 519 (1947)..... 32

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)..... 27

Brady v. *Maryland*, 373 U.S. 83 (1963)..... *passim*

Breard v. *Greene*, 523 U.S. 371 (1998)..... *passim*

Breard v. *Pruett*, 134 F.3d 615 (4th Cir. 1998)..... 23

Brookhart v. *Janis*, 384 U.S. 1 (1966)..... 38

California v. *Hodari D.*, 499 U.S. 621 (1991)..... 48

Case Concerning Avena and Other Mexican Nationals, 2004 I.C.J. No. 128 (Mar. 31)..... 4, 31, 40, 42, 43

Case Concerning United States Diplomatic and Consular Staff (U.S. v. *Iran)*, 1979 I.C.J. No. 64 (Dec. 15)..... 4

Castro v. *United States*, 540 U.S. 375 (2003)..... 37

Cheung Sum Shee v. *Nagle*, 268 U.S. 336 (1925)..... 18

Chew Heong v. *United States*, 112 U.S. 536 (1884)..... 18

TABLE OF AUTHORITIES—Continued

Page

Chirac v. *Chirac*, 15 U.S. (2 Wheat.) 259 (1817) 18

Clark v. *Allen*, 311 U.S. 503 (1947) 18

Cook v. *United States*, 288 U.S. 102 (1933) 19

de Geofroy v. *Riggs*, 133 U.S. 295 (1890) 18

Edye v. *Robertson (Head Money Cases)*, 112 U.S. 580 (1884) 17, 18

Fairfax's Devisee v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) 19

Foster v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829) 19, 20

Gerritsen v. *Escobar Y Cordova*, 721 F. Supp. 253 (C.D. Cal. 1988) 33

Guinan v. *United States*, 6 F.3d 468 (7th Cir. 1993) 39, 40

Hauenstein v. *Lynham*, 100 U.S. 483 (1880) 18

Head v. *Stripling*, 590 S.E.2d 122 (Ga. 2003) 39

Hoffman Plastic Compounds, Inc. v. *NLRB*, 535 U.S. 137 (2002) 36

Illinois v. *Wardlow*, 528 U.S. 119 (2000) 48

Jogi v. *Voges*, 425 F.3d 367 (7th Cir. 2005) 23, 33

Johnson v. *Browne*, 205 U.S. 309 (1907) 18

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 38

Jones v. *United States*, 526 U.S. 227 (1999) 44

Jordan v. *Tashiro*, 278 U.S. 123 (1928) 18

Kolovrat v. *Oregon*, 366 U.S. 187 (1961) 18, 23, 27

LaGrand Case (F.R.G. v. *U.S.)*, 2001 I.C.J. No. 104 466 (June 27) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Lovitt v. *Warden*, 585 S.E.2d 801 (Va. 2003)	39
Massaro v. *United States*, 538 U.S. 500 (2003)	39, 41, 42
Medellín v. *Dretke*, 125 S. Ct. 2088 (2005)	*passim*
New York v. *Hill*, 528 U.S. 110 (2000)	38
Nielsen v. *Johnson*, 279 U.S. 47 (1929)	18
Ornelas v. *United States*, 517 U.S. 690 (1996)	36
Pasquantino v. *United States*, 125 S. Ct. 1766 (2005)	17
Pederson v. *State*, 692 N.W.2d 452 (Minn. 2005)	39
Price v. *Forrest*, 173 U.S. 410 (1889)	32
Risk v. *Halvorsen*, 936 E.2d 393 (9th Cir. 1991)	33
Soc'y for the Propagation of the Gospel in Foreign Parts v. *New Haven*, 21 U.S. (8 Wheat.) 464 (1823)	19
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004)	20
Stone v. *Powell*, 428 U.S. 465 (1976)	50
Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176 (1982)	21
Syvertson v. *State*, 699 N.W.2d 855 (N.D. 2005)	39
Tabion v. *Mufti*, 73 F.3d 535 (4th Cir. 1996)	34
Torres v. *Mullin*, 124 S. Ct. 919 (2003)	35
United States v. *Agurs*, 427 U.S. 97 (1976)	49

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Alvarez-Machain*, 504 U.S. 655 (1992)	20
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)	18
United States v. *Dominguez-Benitez*, 542 U.S. 74 (2004)	41
United States v. *Emuegbunam*, 268 F.3d 377 (6th Cir 2001)	31
United States v. *Jung Ah Lung*, 124 U.S. 621 (1888)	19
United States v. *Li*, 206 F.3d 56 (1st Cir. 2000)	23, 29
United States v. *Olano*, 507 U.S. 725 (1993)	38
United States v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833)	45
United States v. *Rauscher*, 119 U.S. 407 (1886)	18, 19
United States v. *Stuart*, 489 U.S. 353 (1989)	34
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)	20
Ware v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796)	19
Warren v. *United States*, 340 U.S. 523 (1951)	18
Whitman v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001)	32
Whitney v. *Robertson*, 124 U.S. 190 (1888)	20
Williams v. *Taylor*, 529 U.S. 362 (2000)	22, 36
Zicherman v. *Korean Air Lines Co.*, 516 U.S. 217 (1996)	21

TABLE OF AUTHORITIES—Continued

Page

TREATIES, STATUTES, AND RULES

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488:

Art. I, 21 U.S.T. 326 ..... 1, 3, 4, 30, 31

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261:

Art. 36 ..... *passim*

Art. 36(1)(a) 22

Art. 36(1)(b) 3, 22, 23, 26, 30

Art. 43 33

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2255 39

U.S. Const. art. VI, cl. 2 ..... 1, 16

MISCELLANEOUS

Articles of Confederation, arts. 6, 9 16

Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliott ed., 2d ed. 1881) 17

The Federalist No. 22 (Clinton Rossiter ed., 1961) 17

The Federalist No. 64 (Clinton Rossiter ed., 1961) 16

Letter From Attorney General John Ashcroft to Ambassador Carlos de Icaza (June 3, 2004) 29

The Records of the Federal Convention of 1787 (Max Farrand ed., rev. ed. 1966) 16

TABLE OF AUTHORITIES—Continued

Page

Report of the United States Delegation to the United Nations Conference on Consular Relations, reprinted in Vienna Convention on Consular Relations and Optional protocol, S. Exec. Doc. E, 91-9 (1969)..... 20, 26

U.N. Conference on Consular Relations: Official Records, U.N. Doc. A/Conf.25/16, U.N. Sales No. 63.X.2 (1963)..... *passim*

U.S. Department Of State, Consular Notification And Access 20, 28

U.S. Department Of State, Foreign Affairs Manual (2004)..... 27, 28, 37

Carlos M. Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082 (1992)..... 17

BRIEF FOR PETITIONER MARIO A. BUSTILLO

OPINIONS BELOW

The decision of the Supreme Court of Virginia (J.A. 241-242) is unreported. The May 4, 2004, decision of the Fairfax County Circuit Court (J.A. 155-169) is unreported; the September 16, 2003, decision of the Fairfax County Circuit Court (J.A. 138-154) is reported at 63 Va. Cir. 125; the February 21, 2003, decision of the Fairfax County Circuit Court (J.A. 136-137) is unreported; and the August 8, 2002, decision of the Fairfax County Circuit Court (J.A. 120-131) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 7, 2005. On May 25, 2005, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 5, 2005, and the petition was filed that day. The petition was granted, limited to Question 1, on November 7, 2005. 126 S. Ct. 621. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Relevant portions of the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101; and the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1953, 21 U.S.T. 325, are set forth in the Appendix to the Petition for a Writ of Certiorari (Pet. App. 51a-55a) and the Appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

This case concerns whether a foreign national may seek judicial relief from a conviction obtained in violation of the Vienna Convention on Consular Relations ("Vienna Conven-